(37,585)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 30

FRANK E. COOPER, AS TRUSTEE IN BANKRUPTCY OF WAUCHULA CENTRAL PHARMACY, INC., BANKRUPT, PETITIONER,

vs.

R. F. DASHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOF THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

In re WAUCHULA CENTRAL PHARMACY, INC., a Corporation Organized and Existing under the Laws of the State of Florida

In Bankruptcy

AMENDED INVOLUNTARY PETITION IN BANKRUPTCY—Filed February 26, 1931

To the Honorable Judges of the above-styled court:

The petition of Tampa Drug Company, a corporation organized and existing under the laws of the State of Florida, with its principal place of business at Tampa, Florida; Eli Witt Cigar Company, a corporation organized and existing under the laws of the State of Florida, with its principal place of business at Tampa, Florida; and Turner-Taylor Company, a corporation organized and existing under the laws of the State of Florida, with its principal place of business at Tampa, Florida, respectfully shows:

(1) That Wauchula Central Pharmacy, Inc., is a corporation organized and existing under the laws of the State of Florida, with its principal place of business at Wauchula, Florida, and is not a municipal, railroad, insurance or banking corporation, and that the said Wauchula Central Pharmacy, Inc., a Florida corporation, has for the greater portion of six (6) months last preceding the date of the filing of this Petition, had its principal place of business at Wauchula, in the County of Hardee, in said Southern District of Florida, and owes debts to and exceeding the amount of One Thousand ($1,000.00) Dollars.

[fol. 2] (2) That your Petitioners are creditors of the said Wauchula Central Pharmacy, Inc., a corporation, having provable claims, amounting in the aggregate in excess of securities held by them, to and exceeding the sum of Five

Hundred ($500.00) Dollars; that the nature and amount of your Petitioners' claims are as follows:

(a) The claim of your Petitioner, Tampa Drug Company, a Florida corporation, is a debt upon open account for merchandise sold and delivered into the Wauchula Central Pharmacy, Inc., the above named alleged bankrupt, of an actual value of Eight Hundred Nine and 34/100 ($809.34) Dollars.

(b) The claim of your Petitioner, Eli Witt Cigar Company, a Florida corporation, is a debt upon open account for merchandise sold and delivered unto the Wauchula Central Pharmacy, Inc., the above named alleged bankrupt, of an actual value of One Thousand Seven Hundred Forty-nine and 90/100 ($1,749.90) Dollars.

(c) The claim of your Petitioner, Turner-Taylor Company, a corporation under the laws of the State of Florida, is a debt upon a promissory note for merchandise sold and delivered unto the Wauchula Central Pharmacy, Inc., the above named alleged bankrupt, of an actual value of Five Hundred Fifty and No/100 ($550.00) Dollars.

3. That the said Wauchula Central Pharmacy, Inc., a corporation, the above named alleged bankrupt, is insolvent and was insolvent on the date of the filing of the original Petition herein, and that within four (4) months next preceding the date of the filing of the original involuntary Petition and within four (4) months next preceding the date of [fol. 3] the filing of this amended involuntary Petition, the Wauchula Central Pharmacy, Inc., a corporation, committed certain acts of bankruptcy, to-wit:

(a) In that it did heretofore on the 13th day of February, A. D. 1931, while insolvent, transfer a portion of its property, to-wit, Twenty-five and No/100 ($25.00) Dollars, unto the Poinsettia Dairy Products, Inc., a corporation organized and existing under the laws of the State of Florida, and having its principal place of business at Tampa, Florida, the said Poinsettia Dairy Products, Inc., being one of its creditors, with intent to prefer such creditor over its other creditors.

(b) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 27th day of Octo-

ber, A. D. 1930, while insolvent, transfer a portion of its property, to-wit, One Hundred Forty-one and 86/100 ($141.86) Dollars, unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(c) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 11th day of November, A. D. 1930, while insolvent, transfer a portion of its property, to-wit, Two Hundred Seventy-two and 17/100 ($272.17) Dollars, unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(d) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 25th day of November, A. D. 1930, while insolvent, transfer a portion of its property, to-wit: One Hundred Eighty-four and 11/100 [fol. 4] ($184.11) Dollars, unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(e) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 11th day of December, A. D. 1930, while insolvent, transfer a portion of its property, to-wit, Two Hundred Fifteen and 67/100 ($215.67) Dollars, unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(f) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 14th day of January, A. D. 1931, while insolvent, transfer a portion of its property, to-wit, One Hundred and No/100 Dollars ($100.00) unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(g) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 21st day of January, A. D. 1931, while insolvent, transfer a portion of its property, to-wit, Sixty-eight and No/100 ($68.00) Dollars unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(h) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 28th day of January, A. D. 1931, while insolvent, transfer a portion of its property, to-wit, Thirty-six and 92/100 ($36.92) Dollars, unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

[fol. 5] (i) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did heretofore on the 4th day of February, A. D. 1931, while insolvent, transfer a portion of its property, to-wit, Twenty and 38/100 ($20.38) Dollars unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(j) In that the alleged bankrupt Wauchula Central Pharmacy, Inc., did heretofore on the 11th day of February, A. D. 1931, while insolvent, transfer a portion of its property, to-wit, Sixty-seven and 40/100 ($67.40) Dollars, unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(k) In that the alleged bankrupt, Wauchula Central Pharmacy, Inc., did her-tofore on the 20th day of February, A. D. 1931, while insolvent, transfer a portion of its property, to-wit, Forty and 54/100 ($40.54) Dollars, unto McKesson-Groover-Stewart Drug Company, a Florida corporation, one of its creditors, with intent to prefer such creditor over its other creditors.

(4) That the said Wauchula Central Pharmacy, Inc., a corporation, the above named alleged bankrupt, within four (4) months next preceding the date of the filing of the original involuntary petition and within four (4) months next preceding the date of the filing of this amended involuntary petition, committed a certain further act of bankruptcy in that on the 8th day of January, A. D. 1931, the said alleged bankrupt transferred a part of its property of great value, to-wit, approximately Three Thousand and No/100 ($3,000.00) Dollars, unto one R. F. Dasher, a stockholder and officer in the said alleged bankrupt corporation, [fol. 6] with intent to hinder, delay and defraud its creditors, or some of them. Schedule of said property, marked

Petitioner's Exhibit "A", is hereto attached and prayed to be made a part hereof.

(5) That the said Wauchula Central Pharmacy, Inc., a corporation, the above named alleged bankrupt, within four (4) months next preceding the date of the filing of the original involuntary Petition and within four (4) months next preceding the date of the filing of this amended involuntary Retition did commit a further act of bankruptcy in that it did conceal certain goods, wares and merchandise, a more particular description of which is to the Petitioners unknown, in and about the City of Wauchula and other places in the State of Florida, and more exact location of which are to your Petitioners unknown, with intent to hinder, delay and defraud its creditors or some of them.

(6) That the said Wauchula Central Pharmacy, Inc., a corporation, the above named alleged bankrupt, within four (4) months next preceding the date of the filing of the original involuntary Petition and within four (4) months next preceding the date of the filing of this amended involuntary Petition, did commit further acts of bankruptcy in that it did with intent to hinder, delay and defraud its creditors, or some of them, conceal certain goods, wares and merchandise, to-wit:

(a) Three (3) Barrels, or casks, of Coca-Cola syrup, containing approximately forty (40) gallons each; one (1) barrel, or cask, of Cherry-Smash syrup, containing approximately forty (40) gallons; and five (5) barrels, or casks, of various soda fountain syrups shipped by Bryden & Company, manufacturers of Brock confectioner's products, said barrels, or casks, containing approximately fifty (50) gallons each; all concealed and located in a shed [fol. 7] situated on a dairy farm managed and operated by one Alfred Van Vorhees approximately three and seven-tenths (3.7) miles in a northwesterly direction from the City of Wauchula, County of Harde, State of Florida.

(b) Certain goods, wares and merchandise, to-wit, bulk packages of goods of the character ordinarily sold in retail drug stores, a more particular description of which is to your Petitioners unknown, on the second floor of a brick building located in the City of Wauchula, Florida, the entrance to which is approximately two (2) doors west of the place of business occupied by the said alleged bankrupt.

(c) Certain goods, wares and merchandise, to-wit, bulk packages of goods of the character ordinarily sold in connection with retail drug stores, a more particular description of which is to your Petitioners unknown, at a farm house located upon the property known as the Charlie Rutherford property and near the Dixie Highway about one (1) mile in a southwesterly direction from the place of the business of the said alleged bankrupt.

(d) Certain goods, wares and merchandise, to-wit, bulk packages of goods of the character ordinarily sold in retail drug stores, a more particular description of which is to your Petitioners unknown, at a bungalette appurtenant to the residence of R. F. Dasher, a stockholder and officer of the said alleged bankrupt corporation, in or near the City of Wauchula, Florida.

(7) Wherefore your Petitioners pray that service of this amended involuntary Petition with a Subpœna may be made upon the said Wauchula Central Pharmacy, Inc., a Florida corporation, as provided in the Acts of Congress relating to bankruptcy, and that the said Wauchula [fols. 8 & 9] Central Pharmacy, Inc., a Florida corporation, may be adjudged by the Court to be a bankrupt within the purview of said Acts.

Tampa Drug Company, by C. L. Bromley, Treas. (Seal.) Eli Witt Cigar Company, by W. L. Vandyke. (Seal.) Turner-Taylor Company, by J. M. Turner, Jr., Pres. (Seal.) Bivens & Huggins, by W. J. Bivens, Solicitors for Petitioning Creditors.

Duly sworn to by C. L. Bromley et al. Jurats omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

Schedule

1 Diamond Dye Case.
1 Rit Dye Case.
1 Tintex Dye Case.
1 Putnam Dye Case.
2 Pharmacopeas, 9th Edition.
2 Mortars.

2 Pessels.
1 Adding Machine, Wales.
8 Straw Holders.
8 Soda Tables.
32 Chairs.
1 Candy Case, 5 ft.
1 Magazine Rack.
3 Ice Cream Dippers.
1 Interior Display Drug Store Service Equipment, including Wall Cases, Prescription Case, Wrapping Counter, Cash Register and Stand.
All of National Show Case Equipment in Store.
1 Outside Electric Sign.
4 Light Fixtures.
2 Ceiling Fans.
2 Paper Racks.
1 Iron Safe (Cary).
1 Dip-Rite Cream Dipper.
1 National Weighing Machine (Novelty).
1 Cigar Case.
1 Ice Shaver.
1 Prescription Scale.
1 Ice Box.
1 Lemon Squeezer.
2 Milk Shakers.
1 Cigar Lighter.
1 Label Cabinet,
1 Pill Tile.
1 Syrup Percolator.
[fol. 11] 1 Cash Register, Factory No. 2718764.
1 Cash Register, Factory No. 2718490-175.
1 Prescription Counter.
6 Superior Chain Drive Carbonator AC 110 Complete.
1 Liquid Carbonic Soda Fountain, 12 ft. Mechanical Soda Fountain Equipped with Frigidair-, ½ Horse Power complete.
1 Underwood Typewriter.
1 Sun-Kist Juice Extractor.
1 Spatula.
6 Curb Service Trays.
1 Hot Chocolate Percolator.
1 Cone Holder.
1 Waterman Fountain Pen Case.

IN UNITED STATES DISTRICT COURT

No. 2420

In Bankruptcy

[Title omitted]

ADJUDICATION OF BANKRUPTCY AND ORDER OF REFERENCE—Filed and Entered March 21, 1931

At Tampa, in said District, on the 26th day of February, A. D. 1931, before the Honorable Alexander Akerman, Judge of said Court in Bankruptcy, the Amended Petition of Tampa Drug Company, a corporation, et al., that Wauchula Central Pharmacy, Inc., a corporation be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Wauchula Central Pharmacy, Inc., a corporation is hereby declared and adjudged a bankrupt accordingly.

[fol. 12] It is therefore ordered, that upon the Amended Petition filed in this Court by or against said bankrupt on the 26th day of February, A. D. 1931, said matter be referred to H. P. Baya, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Wauchula Central Pharmacy, Inc., a corporation shall attend before said Referee on the 6th day of April, at Tampa, Fla., and thenceforth shall submit to such orders as may be made by said Referee of by this Court relating to said bankruptcy.

Witness the Honorable Alexander Akerman, Judge of the said Court, and the seal thereof, at Tampa in said District, on the 21st day of March, A. D. 1931.

Edwin R. Williams, Clerk, by Louise Dykeman, Deputy Clerk. (Seal of the Court.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ORDER UPON R. F. DASHER, PRESIDENT, TO TURN OVER $23,101.84 ASSETS OF THE BANKRUPT—Filed July 7, 1931

To the Honorable H. P. Baya, referee in bankruptcy:

Your undersigned Trustee, Frank E. Cooper, heretofore appointed and qualified as Trustee in Bankruptcy in this

cause, respectfully shows unto the Court that it appears [fol. 13] from the testimony of R. F. Dasher, President of the bankrupt corporation herein, and from the records of the Bankrupt and of the said R. F. Dasher now in possession of your undersigned Trustee and duly filed in evidence herein, that on May 26, 1930, the date on which the bankrupt corporation started transacting business, that it possessed assets in the sum of Fifteen Thousand Dollars ($15,000.00) and negligible liabilities; that this Fifteen Thousand Dollars ($15,000.00) consisted of a value of Five Thousand Two Hundred and Sixty Dollars ($5,260.00) in fixtures and a value of Nine Thousand Seven Hundred and Forty Dollars ($9,740.00) in merchandise; that subsequent to the incorporation and prior to bankruptcy the bankrupt corporation actually received merchandise purchased by it in the sum of Sixty-four Thousand Fifty-one Dollars and Eighty-two Cents ($64,051.82); that, therefore, between incorporation and bankruptcy the bankrupt corporation received in merchandise bought for sale the value of Seventy-three Thousand, Seven Hundred Ninety-one Dollars and Eighty-two Cents ($73,791.82); that the total aggregate sales of the said corporation during its corporate existence and prior to bankruptcy aggregated only Thirty Thousand, Seven Hundred Forty-one Dollars and Thirty Cents ($30,741.30) at retail prices, which amounts to Twenty-one Thousand, Five Hundred Eighteen Dollars and Ninety-four Cents ($21,518.94) at cost; that the total value of merchandise delivered to your receiver by the said bankrupt was the sum of Twenty-nine Thousand, One Hundred Seventy-one Dollars and Four Cents ($29,171.04), whereby the said bankrupt has thus far accounted to this Court only for merchandise in the sum of Fifty Thousand, Six Hundred Eighty-nine Dollars and Ninety-eight Cents ($40,689.98), and has withheld from this Court and from your undersigned Trustee, as an officer thereof, the remainder of the merchandise, or the [fol. 14] proceeds thereof, and has failed and neglected and refused to deliver such remainder of the merchandise, or the proceeds or value thereof, to your undersigned Trustee; that such remainder amounts to a value of Twenty-three Thousand, One Hundred and One Dollars and Eighty-four Cents ($23,101.84).

And your undersigned Trustee further respectfully shows unto the Court that it appears from the testimony of the said R. F. Dasher and from the records of the Bankrupt corporation and exhibits filed in this cause that the bankrupt corporation was organized for the sole purpose of taking over the individual business theretofore owned exclusively by R. F. Dasher, that the sole consideration for issuance of any stock therein was the transfer of assets belonging to R. F. Dasher; that there are and have always been only three stockholders, officers and directors in the said corporation, to-wit: R. F. Dasher, his wife and infant child; that subsequent to incorporation and prior to bankruptcy the exclusive charge, management and control of the affairs of the corporation and acquisition and disposition of its assets and maintenance of its accounts rested in R. F. Dasher and under his personal control and supervision; that no other stockholder, officer or director of the said corporation had or exercised any control, management or supervision of such assets or accounts; that the said R. F. Dasher managed the affairs of the said corporation, to all intents and purposes, as thoroughly and completely as he had managed the affairs of the said business prior to its incorporation, and is personally acquainted with and accountable for the disposition of its assets, and, therefore, now has the possession and control of the said assets of the bankrupt in the sum of Twenty-three Thousand, One Hundred One Dollars and Eighty-four Cents ($23,101.84) yet undelivered to your undersigned Trustee, as aforesaid.

[fol. 15] Wherefore, your undersigned Trustee respectfully prays that this Court may immediately enter an order requiring the said R. F. Dasher, President of the bankrupt corporation, as aforesaid, on or before a day certain, to show cause unto this Court, if any he can, why an order should not be entered requiring him to immediately and before a time certain to deliver and surrender to your undersigned Trustee all the remainder of the assets of the aforesaid bankrupt corporation in his custody and control and not heretofore accounted for and surrendered to your undersigned Trustee, to-wit, assets of a value of Twenty-three Thousand, One Hundred and One Dollars and Eighty-four Cents ($23,101.84), or the proceeds or value thereof; that such order to show cause may be immediately served

upon the said R. F. Dasher, or his Attorney, and that he may be required on or before a time therein set to be prepared to show cause and present evidence why such turn over order should not be entered; and that upon the failure of the said R. F. Dasher to show satisfactory and reasonable cause why he should not be required to turn over and deliver such unaccounted for assets that this Honorable Court may enter an order requiring the said R. F. Dasher, President and sole executive manager of said bankrupt corporation, as aforesaid, on or before a day certain to be therein named, to surrender, turn over and deliver to your undersigned Trustee all the assets of the aforesaid bankrupt in his possession and control and not heretofore surrendered, turned over and accounted for, to-wit: merchandise of a value of Twenty-three Thousand, One Hundred and One Dollars and Eighty-four Cents ($23,101.84), or the proceeds or reasonable value thereof.

And your petitioner will ever pray.

(Signed) Frank E. Cooper, Trustee. (Signed) C. Edmund Wirth, Attorney for Trustee.

[fol. 16] *Duly sworn to by Frank E. Cooper. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONSE OF R. F. DASHER

Now comes R. F. Dasher, the respondent in the petition heretofore filed by Frank E. Cooper, Trustee, on the 7th day of July, A. D. 1931, by his undersigned attorneys, and reserving unto himself all manner of exceptions and objections that may be made to said petition in the form thereof, for answer to said petition and the rule of Court issued thereon, this respondent says:

That this Honorable Court is without jurisdiction to proceed to determine the issues raised by said petition in a summary manner such as is sought to be undertaken in this case for the following reasons, to-wit:

[fol. 17] Because there is no provision in the United States Bankruptcy laws for a proceeding such as is sought to be maintained by this petition.

Because said petition is couched in such general language that it is impossible for the respondent or anyone else to determine what property of the bankrupt corporation this respondent is charged with having in his possession or withholding from said bankrupt's Trustee.

Because said petition describes no property whatsoever and does not allege or show that any property belonging to the bankrupt or the estate of the bankrupt is now in the possession of this respondent.

Because said petition is without precedent in law and is trifling, frivolous and without merit.

Further answering said petition, respondent avers that he, as President of the bankrupt corporation, has turned over and delivered to the Receiver, and Trustee who succeeded said Receiver, all of the assets, books of account and properties of said bankrupt corporation, of every nature, kind and character whatsoever, within the knowledge of this respondent, and that there are no assets of said bankrupt corporation or the estate of said bankrupt corporation, within the knowledge of this respondent, except those held by the Trustee; that this respondent has never at any time subsequent to the bankruptcy of said corporation had in his possession, custody or control any properties or assets of said corporation of any kind, nature or description whatsoever.

Further answering said petition, this respondent specifically denies that he has $23,101.84 of the assets of the bankrupt in money, property, choses in action, or any other kind or character of property, real, personal or mixed, but avers [fol. 18] that all assets of every character, kind and nature of said bankrupt are now in the possession of the Trustee, so far as the knowledge of this respondent extends, and alleges the truth and fact to be that, as President of said bankrupt corporation, he has caused the schedules in bankruptcy to be made out, signed, sworn to and filed, in compliance with the Court's directions and that the same reflect the true status of the corporation's fiscal affairs as far as it lies within the power of this respondent to set up the same.

This respondent further charges that from the time of the filing of the involuntary petition in bankruptcy against the corporation aforesaid, this respondent individually and as President of said corporation has complied fully and in

good faith with every provision of the bankruptcy laws of the United States as far as it lies within his power so to do.

Wherefore, this respondent respectfully represents unto Your Honor that this Honorable Court is without jurisdiction to proceed in a summary manner to determine the rights of your respondent in this proceeding and thereupon, having fully answered the aforesaid rule, this respondent prays to be hence dismissed with his costs in this behalf most wrongfully sustained.

R. F. Dasher, Respondent, Whitaker Bros., Frank Q. Phillips, Attorneys for Respondent.

Duly sworn to by R. F. Dasher. Jurat omitted in printing.

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER OF REFEREE DIRECTING DASHER TO TURN OVER PROPERTY TO TRUSTEE—Dec. 10, 1931

At Tampa, Florida, this cause coming on to be heard upon an order heretofore entered by the Court upon petition of Frank E. Cooper, Trustee in Bankruptcy, praying that R. F. Dasher show cause why he should not be ordered to turn over to the said Trustee assets of the corporation in his hands in the sum of $23,101.84, and the Answer of the said R. F. Dasher to the order above mentioned, and the testimony taken before the Court at which all parties in interest were present.

The Trustee in Bankruptcy was represented by C. Edmund Worth and, associated with him, W. J. Bivens, Attorney for Petitioning Creditors. R. F. Dasher was represented by Tom Whitaker and Frank Phillips.

R. F. Dasher, President of the bankrupt corporation, in the beginning objected to the summary jurisdiction of the Court, which said objections were overruled. Whereupon the Answer of R. F. Dasher was filed and the testi-
[fol. 20] mony taken. The testimony in this case has been voluminous, and there have been a large number of exhibits and a great number of witnesses brought before the Court, whose testimony has been carefully considered.

The following facts appear from the testimony:

That upon the appointment of a Receiver by the District Judge, the said Frank E. Cooper, so appointed, undertook to take over immediately the possession of all of the assets, effects and property of the above named bankrupt; that the assets taken over by the said Receiver were found in some eight (8) different places:

1st. In the retail drug store operated at Wauchula, Florida.

2nd. In a warehouse or storage room next door to the bankrupt's store.

3rd. In a garage under the bungalette home of R. F. Dasher, President of the bankrupt corporation.

4th. In a storage room upstairs over the retail store of Wauchula Dry Goods Company, securely partitioned off and locked from the premises of the said Dry Goods Company, but accessible only through them.

5th. In certain storage rooms behind an unfinished garage under the bungalette residence of one Charles B. Rutherford near Wauchula, Florida.

6th. In a bed room in the residence quarters of Charles B. Rutherford on the second floor over the unfinished garage mentioned above and accessible only through the living quarters of the said Rutherford.

7th. In a lean-to shelter on the dairy farm of one Alfred Van Voorhees, some three miles from Wauchula, Florida, on an unimproved country road.

[fol. 21] 8th. In a shack some seven (7) miles from Wauchula, Florida, on an unimproved road in a sparsely populated locality.

That none of said storage places save those mentioned in sub-paragraphs 1st, 2nd and 3rd, were known to exist as storage places of assets of the bankrupt corporation by any of the creditors, employees of the bankrupt, or by the public generally, save only by the said R. F. Dasher and the persons who had charge of such storage for him. That all of the merchandise mentioned in sub-paragraphs 7th and 8th, had been moved into these places during the night time and early morning of the night immediately following the filing of the Petition in Bankruptcy herein, and, that arrangements had been made for the use of the shanty and of the Van Voorhees shed during the same day on which the Petition in Bankruptcy was filed. That during that

day, or the succeeding day, certain rooms in a rooming house located over the drug store had been rented by one Schwinn, and has been used by the said R. F. Dasher temporarily for the storage of certain merchandise which was again removed before the Receiver of this Court took charge a few days later. That within a few days prior to bankruptcy there had been also stored a large number of barrels of fountain sirups in the garage at the home of one William Cliett in Bowling Green, Florida, the property of the bankrupt, which were, however, again transferred to some of the other storage places prior to the receivership. That shortly prior to bankruptcy the premises of one McGinnis had also been used as a storage place for merchandise of the bankrupt, but, that at the time the Receiver took charge there was no merchandise found there. That all of the merchandise found in locations mentioned in sub-paragraphs 4th, 5th, 6th, 7th and 8th, which was in its original containers, had had the name of the addressee removed, or attempted to be removed, by cutting the same [fol. 22] out in the case of pasteboard cartons, and, by painting over with black paint in the case of wooden packages. That a large quantity of the merchandise consisted of re-packed cases of assorted merchandise of quantities typical of those usually carried on the shelves of a retail store with inventories on the outside of each carton as to what the contents of such re-packed cases were. That no officer or regular employee of the bankrupt corporation was allowed to have any access to or knowledge of the existence of any of the merchandise stored in locations mentioned in sub-paragraphs 4th, 5th, 6th, 7th and 8th, above. But that the said R. F. Dasher, President of the said bankrupt corporation, and its sole executive manager, personally exercised exclusive custody over all the assets and merchandise of the bankrupt corporation, save such as were located in sub-paragraphs 1st and 2nd, above. That while regular draymen did all regular hauling to places mentioned in sub-pargraphs 1st, 2nd and 3rd, the hauling done to the other locations was always done by borrowed or rented trucks of people engaged in other business. That while the Receiver took charge of all the assets mentioned in the locations in the eight (8) sub-paragraphs above, certain other assets, to-wit: the Tampa Straights cigars mentioned hereinafter in this Order appeared in the

custody of the said Dasher some seven months and more subsequent to the bankruptcy; and, that certain other assets of the bankrupt, to-wit: the other specific items hereinafter enumerated in this Order were bought on the credit of the bankrupt but appropriated to the personal use of the said R. F. Dasher; that about eight months prior to bankruptcy a Chattel Mortgage was attempted to be placed on all the fixtures and equipment of the bankrupt corporation in favor of a brother of the said R. F. Dasher, and, subsequently, and in less than two months of bankruptcy this was replaced by a Bill of Sale to the said R. F. Dasher, [fol. 23] himself, both of which instruments have been heretofore held by the undersigned and the District Judge to have been fictitious, without consideration and a mere sham. That the said R. F. Dasher procured the lease on the premises where the corporation did business in his own name and attempted to claim it against the creditors of the corporation in this Court, although the corporation had paid the entire consideration therefor. That within sixty (60) days prior to bankruptcy the only other remaining property of the said R. F. Dasher of any value, to-wit: an orange grove was incorporated and the bulk of the stock in said corporation, as in the case of this bankrupt corporation, placed in the names of the wife and infant son of the said R. F. Dasher.

I have carefully considered the testimony of all parties, bearing in mind the rule in this class of cases, that the right of a Trustee to a Turn Over Order should be supported by clear and convincing evidence, and that a mere preponderance is not sufficient.

Oriel vs. Russell, Prela vs. Hubshman, 73 L. Ed. 419, 278 U. S. 358.

To the testimony of Charles B. Rutherford, Alfred Van Voorhees, J. R. Powell and Ramon McLeod, when considered in connection with their appearance and demeanor on the witness stand, and, in the case of Van Voorhees and Powell in connection with their prior contradictory statements and their attempted explanations thereof, I can give no credence. I have carefully considered the evidence of all the other witnesses and of the various exhibits shown in evidence, and, particularly, the testimony of R. F. Dasher himself, and his explanations and accountings for his property,

and, have considered the interest of the infant son and wife [fol. 24] of the said Dasher, as testified to by him, and, from this consideration, I further find the following facts:

That on May 26th, 1930, at the beginning of the bankrupt corporation's existence, the stock of merchandise on hand by the bankrupt corporation was, according to the audit of the bankrupt's books, $8,940.27, and, according to the testimony of the said R. F. Dasher, at least $8,500. In a desire to rely only on testimony that is clear and convincing, I have used the latter figure.

That there was purchased, during the active life of the bankrupt corporation, merchandise of a cost value of $64,051.82, as shown by the books of the said corporation, kept by R. F. Dasher himself, and verified by the auditor as accurate by other accounting methods, all of which merchandise was purchased by and actually received by the bankrupt between its incorporation May 26th, 1930, and prior to the Bankruptcy Receivership February 26th, 1931, making a total of $72,551.82 in merchandise actually received by the bankrupt during its corporate existence.

That the total sales of the corporation during this period as reflected by its books were the sum of $30,741.34 at retail prices. That this sum included a gross profit of not less than twenty-five per cent (25%), (or, $7,685.33), according to the testimony of R. F. Dasher himself. In other words, the cost value of the merchandise so sold by the bankrupt during its existence was $23,056.01. This portion of the assets standing thus accounted for would leave a balance of $49,495.81 assets of the bankrupt remaining in the hands of the said R. F. Dasher as its sole custodian at the date of bankruptcy.

The inventory of all the merchandise on hand at the date of bankruptcy, which actually came into the possession of the Receiver from each of the several storage places above mentioned, made at cost price by competent appraisers, was [fol. 25] of a value of $29,171.04. The accuracy of this inventory at cost price was fully inquired into and, while it appears that the said inventory is accurate and its accuracy has not been impeached by the respondent, I find that the maximum possible error in valuations by the officers of this Court could not exceed two per cent (2%). I have, there-

fore, given the benefit of this possible error to the bankrupt by adding to the above appraised figures two per cent (2%) thereof, (or $583.42), and thereby valuing the merchandise received by this Court in the sum of $29,754.46, merchandise which value I find has been accounted for by the respondent by delivery to the proper officers of this Court. This sum deducted from $49,495.81, above mentioned, leaves a balance of merchandise of a value of $19,741.35 unaccounted for. That these goods were on hand at the date of bankruptcy and do not represent any slow leakage over the entire period is borne out by a study of the last four and a fraction months of operation. From October 1, 1930, to bankruptcy, the corporation bought and received new merchandise of a cost value of nearly $45,000.00. It sold, during that period, at retail price only $9,500.00 (which is equivalent to a cost value of about $7,000.00), leaving a net accumulation of unsold merchandise between October 1st, 1930, bankruptcy, of about $38,000.00, in addition to that on hand at that date (which stock on hand October 1st, 1930, must have been pretty well filled out, for from May 26th, 1930, to October 1st, 1930, the corporation's purchases at wholesale cost had exceeded its sales at retail price by more than $2,000.00). Yet, only about $29,000.00 at wholesale cost was found on hand by the Receiver.

However, I find that certain specific merchandise hereinafter specifically mentioned and described, and specifically ordered delivered, is of a value of $583.69, leaving a balance of merchandise in the hands of the said R. F. Dasher at the time of bankruptcy at a cost price value of $19,157.66 [fol. 26] of a class of merchandise shown by the proofs of claim to have been purchased on the credit of the bankrupt corporation and delivered to it, and, of such a class of merchandise as is usually carried and sold in a retail drug store, but, which is not capable of a more specific description, such more specific description being known only to the respondent in this cause.

It is therefore ordered, adjudged and decreed that the said R. F. Dasher, the President and executive manager of the bankrupt corporation, do, within ten (10) days from the date of this Order, turn over and deliver to Frank E. Cooper, as Trustee in Bankruptcy of the above named bankrupt, the following goods, wares and merchandise pur-

chased from Albert Pick-Barth Company, Inc., charged to the account of the bankrupt and appropriated to the sole and exclusive use of the said R. F. Dasher, to-wit:

2 #17E386 Rugs, size 9'x12' @ $61.50 each, aggregating a value of	$123.00
1 #17E375 Rug, size 9'x12' @	39.50
3 #17E1126F Rugs, size 24"x36" @ $2.95	8.85
3 doz. #5E318 Bath Towels @ $4.85 doz.	14.55
2 doz. #5E345 Massage Towels @ $2.95 doz.	5.90
2 doz. #5E8504 Wash Cloths @ 85¢ doz	1.70
3 #5E2288 Bed Covers @ $8.75	26.25
2 #5E2553 Bed Spreads @ $6.65	13.30
4 #5E809 Blankets @ $11.90	47.60
4 prs. #5E844 Blankets @ $6.75 pr	27.00
6 #17E729 Rugs 27"x54" @ $11.65	69.90
2 #15E6142 DF Bath Room Cabinets @ $9.85	19.70
1 #5E2553F Bed Spread Rose	6.65

and, also, the following goods, wares and merchandise purchased from Butler Brothers & Company, charged to the account of the bankrupt and appropriated to the sole and [fol. 27] exclusive use of the said R. F. Dasher, to-wit:

3 pr. 5K4951 Shoes @ $3.50 pr.	$10.50
1½ doz. G. S. 745 Shirts @ $24.00 doz.	36.00
½ doz. 7D2261 Ties at $18.00 doz.	9.00
1 1 AX-1776 Coat @ $14.00	14.00
1 doz. GS-2790 Shirts @ $8.50 doz	8.50

and, also, the following goods, wares and merchandise purchased from Art Colony Industries, charged to the bankrupt and appropriated to the sole and exclusive use of the said R. F. Dasher, to-wit:

1 A1044 Dining Room Fixtures	$14.75
1 X1044 Living Room Fixture	14.75
6 A1013 Ceiling Fixtures @ $2.13 each	12.78
6 A 926 Electric Brackets @ $2.88 each	17.28
3 A1014 Ceiling Fixtures @ $2.63 each	7.89
1 pr. C-10 Andirons @ $6.49	6.49
1 A 794 Fire Screen	12.25

all of the said merchandise having been withheld by the said R. F. Dasher from the officers of this Court at the time

of adjudication in bankruptcy herein and at all subsequent times; and, also, to-wit: 8 boxes of Tampa Nugget cigars, containing fifty (50) cigars each, obtained by the said R. F. Dasher after bankruptcy from Eli Witt Cigar Company, in exchange for 8 boxes Tampa Straights cigars, containing fifty (50) cigars each, which said Tampa Straights cigars had been withheld by the said R. F. Dasher from the officers of this Court at the time of delivery of the assets of the said bankrupt corporation to the Receiver herein and at all subsequent times, said cigars being of a value of the sum of $15.60.

[fol. 28] It is further ordered, adjudged and decreed, that the said R. F. Dasher do further, within such ten (10) days from this date, turn over and deliver to Frank E. Cooper, Trustee in Bankruptcy in this cause, other goods, wares and merchandise of the said bankrupt corporation purchased and owned by the said bankrupt corporation, and withheld from the officers of this Court at the time of bankruptcy by the said R. F. Dasher, of a value of $19,157.66, said goods, wares and merchandise being of the character of goods, wares and merchandise such as is shown by the proofs of claim in this cause to have been purchased by the bankrupt corporation and such as is usually carried, sold and offered for sale in drug stores of the character operated by the bankrupt corporation prior to bankruptcy, and being exclusively goods, wares and merchandise purchased by and delivered to the said bankrupt corporation and withheld by the said R. F. Dasher from the officers of this Court at the time of bankruptcy.

Done and ordered at Tampa, Florida, this the 10 day of December, A. D. 1931.

(Signed) H. P. Baya, Referee.

IN UNITED STATES DISTRICT COURT

PETITION OF DASHER FOR REVIEW—Filed Dec. 19, 1931

To H. P. Baya, referee in bankruptcy:

Your petitioner, R. F. Dasher, President and executive manager of the bankrupt corporation, shows that he is the respondent in a certain summary proceedings wherein

Frank E. Cooper, Trustee of the above named bankrupt, [fol. 29] prays for an order requiring this respondent to surrender $23,101.84, said petition being filed on the 7th day of July, A. D. 1931; that in the course of the proceedings on said petition, an order was entered on the — day of ——, A. D. 1931, and by reference made a part hereof, which said order was interlocutory in form and merely asserted the jurisdiction of the Referee to proceed in a summary manner in said cause, to which said order exception was duly noted by the respondent, and on the 10th day of December, A. D. 1931, a final order was made in said proceedings, sustaining the jurisdiction of the Referee to proceed in a summary manner and granting other relief to the Trustee, as will more fully appear by reference to a copy of said order hereto annexed, marked Exhibit "A", and made a part hereof;

That such orders and each of them was and is erroneous in that,

1st. That said Referee was without jurisdiction to make said orders, or either of them, in the premises.

2nd. That said orders and each of them was and is contrary to the evidence as shown by the record herein, and contrary to law.

3rd. That no property whatsoever was described in the petition which is alleged to have been withheld by the respondent from the Receiver and Trustee.

4th. Because said orders and each of them were without evidence to support them.

5th. Because the final order entered in said cause is contrary to the evidence, as shown by the record herein.

[fol. 30] 6th. Because said final order directs the respondent to turn over property to the Trustee which never at any time belonged to the bankrupt corporation or its estate.

7th. Because said final order only describes a small amount of property and the only evidence introduced in the record establishes that bankrupt corporation was fully paid for all of such property.

8th. Because the record in said cause fails to establish by clear and convincing proof that this respondent has in

his possession any property belonging to the bankrupt corporation or its estate.

9th. Because said final order only describes a small amount of personal property, all of which the record shows was fully paid for by the persons receiving the same from the bankrupt corporation.

10th. Because it affirmatively appears from the record in this cause, including the pleadings and evidence, that the rights of the Trustee, if any there be, in this relation, could only be maintained in a plenary suit brought for that purpose.

11th. Because there is no evidence to support the final order entered in said cause.

Wherefore your petitioner, feeling aggrieved because of such orders, prays that the same may be reviewed as provided by the Bankruptcy Act of 1898, and General Order XXVII.

Done this 19th day of December, A. D. 1931.

(Signed) R. F. Dasher, Petitioner, by Tom Whitaker, (Signed) Frank T. Phillips, (Signed) Whitaker Bros., Attorneys for Petitioner.

[fol. 31] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF REVIEW—Filed March 7, 1932

To the Honorable Alexander Akerman, Judge of the United States District Court, Southern District of Florida:

I, H. P. Baya, a Referee in Bankruptcy of the above Court, do hereby certify:

That in the course of the procedure in the above entitled cause and on, to-wit, the 10th day of December, A. D. 1931, an order was entered in the above entitled cause upon petition of Frank E. Cooper, Trustee in Bankruptcy, adjudging and decreeing that R. F. Dasher, the President and Executive Manager of the Wauchula Central Pharmacy, Inc., a corporation, bankrupt, turn over and deliver to the said Frank E. Cooper, as Trustee in Bankruptcy, certain

specific personal properties enumerated in said order, and of the value of $583.69.

And further ordering, adjudging and decreeing that the said R. F. Dasher aforesaid do within ten (10) days from said date turn over and deliver to Frank E. Cooper, Trustee in Bankruptcy, certain other goods, wares and merchandise of the bankrupt corporation purchased and owned by the said bankrupt corporation prior to bankruptcy and withheld from said Trustee, and in the value of $19,157.66.

The aforesaid orders having been entered after the taking of testimony in which all parties in interest were present, and after argument of counsel.

[fol. 32] The sole questions to be determined by the Court are these:

First. Whether the Court of Bankruptcy was without jurisdiction to hear and determine under the order entered as aforesaid and the answer of R. F. Dasher, respondent, in a summary procedure the issues involved, or whether the Trustee should be remitted to a plenary action against the said R. F. Dasher. Upon this issue the undersigned overruled the objection to the jurisdiction, and held that the Court had jurisdiction to inquire into the issues made for the purpose of determining whether or not the said R. F. Dasher, an officer of said corporation, had turned over and delivered to the said Frank E. Cooper, Trustee in Bankruptcy, the certain assets of the alleged value of $23,101.84 alleged in said petition to be in his possession and control as an officer of the said corporation.

The Answer of the said R. F. Dasher specifically denied that he had assets of said alleged value or any other kind or character of property, assets of the bankrupt aforesaid, in his custody or control, and further alleged that as President of the bankrupt corporation he had turned over and delivered to the Receiver and Trustee who succeeded the said Receiver all assets of every kind or character within his knowledge, and that there were no assets of said estate within his knowledge except those held by Frank E. Cooper, Trustee in Bankruptcy, and further alleged that he had never at any time subsequent to the bankruptcy had in his possession, custody or control any property or assets of said bankrupt corporation of any nature, kind or description whatsoever.

The Referee held that an issue was squarely made whether or not the said R. F. Dasher, an officer, an agent, or trustee for the bankrupt, held property in his possession as such officer, agent or trustee for which he would be accountable in the Court of Bankruptcy, and that if upon [fol. 33] the issue so made it should be determined that he held property of the bankrupt aforesaid as an officer, agent or trustee, that the Court had full summary jurisdiction to enter a turn-over order directing that any and all assets found to be held by him as such be turned over and delivered to the Trustee in Bankruptcy of said bankrupt corporation.

Second. The Referee having determined the foregoing, and having taken jurisdiction, found the following issues of fact:

(a) That certain specific personal property fully set forth in the order entered and of the value of $583.69, coming into the sole and exclusive use of the said R. F. Dasher, had been withheld from the said Frank E. Cooper, Trustee in Bankruptcy.

(b) And further found that other goods, wares and merchandise of the bankrupt aforesaid purchased and owned by said bankrupt corporation and of the value of $19,157.66, came into the possession of the bankrupt corporation prior to bankruptcy.

(c) That all of the assets of the bankrupt corporation were under the direct control and management of R. F. Dasher, its President and Manager.

(d) That the said assets of the value of $19,157.66 shown by the testimony to have come into the possession of the Wauchula Central Pharmacy, bankrupt, as aforesaid, and in the exclusive control and management of R. F. Dasher, its President and Manager, has not been put into the possession of Frank E. Cooper, Trustee in Bankruptcy, nor has its absence from the assets in the control of the said R. F. Dasher as President and Manager been in any manner accounted for.

[fol. 34] The specific findings of fact are not enumerated herein, but are fully set forth in the order of the Court directing the turn-over of assets above referred to to Frank E. Cooper, Trustee.

The question for determination of the Court is whether the Referee in Bankruptcy erred,

First, in taking jurisdiction as hereinabove stated; and

Second, in entering the order directing the said R. F. Dasher to turn over and deliver to Frank E. Cooper, Trustee in Bankruptcy, within ten (10) days from the date of said order the assets hereinabove mentioned.

I hand up for the consideration of the Court the following:

(1) The petition of the Trustee for the turn-over order, filed on July 7, 1931.

(2) The answer of R. F. Dasher filed on, to-wit, the 14th day of July, A. D. 1931.

(3) The order directing the said R. F. Dasher to turn over and deliver to Frank E. Cooper, Trustee in Bankruptcy, the assets mentioned in said turn-over order within ten (10) days from the date thereof, filed December 10, 1931.

(4) All testimony taken and exhibits in said cause at the various hearings thereon.

(5) The Petition for Review filed on the 19th day of December, A. D. 1931.

(6) This Certificate of Review.

[fol. 35] (7) In order that the Court might be fully advised, I directed that upon final hearing briefs of the facts upon which the Trustee and respondent relied, together with citations of authority be filed with me, and for the information of the Court I am likewise handing up the briefs filed by C. Edmund Worth, Attorney for the Trustee. Counsel for Respondent filed no brief with me, but at final hearing presented their oral argument and citations of authority.

All of which is respectfully submitted this the 25th day of January, A. D. 1932.

(Signed) H. P. Baya, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

ORDER ON REVIEW SUSTAINING ORDER OF REFEREE REQUIRING R. F. DASHER TO TURN OVER AND DELIVER CERTAIN ASSETS OF THE BANKRUPT—April 26, 1932

Frank E. Cooper, as Trustee in Bankruptcy in the above matter, having on July 7th, 1931, filed a petition with the Referee to require R. F. Dasher, President and sole executive manager of the bankrupt corporation, to turn over and deliver certain assets of the bankrupt corporation to the said Trustee, and the said R. F. Dasher having objected to the jurisdiction of the Referee and of this Court to inquire into the matters referred to in the said petition in a summary proceeding, and said objection having been over-[fol. 36] ruled by the Referee, and, thereafter the said R. F. Dasher having made answer on July 14th, 1931, and, thereafter after the receipt of voluminous evidence the Referee having on December 10th, 1931, entered an Order directing the said R. F. Dasher to turn over and deliver to the Trustee in Bankruptcy herein certain enumerated assets found by the said Referee to have been withheld by the said R. F. Dasher from the said Trustee, minutely described with great particularity in the said Order, and, also, certain other assets consisting of goods, wares and merchandise of a value of Nineteen Thousand One Hundred Fifty-seven and 66/100 Dollars ($19,157.66), being the character of good-, wares and merchandise such as was shown by the proofs of claim in this cause to have been purchased by the bankrupt corporation, and such as is usually carried, sold, and offered for sale in drug stores of the character operated by the bankrupt corporation prior to bankruptcy, and being exclusively goods, wares and merchandise purchased by and delivered to the said bankrupt corporation and withheld by the said R. F. Dasher from the officers of this Court at the time of bankruptcy, and the said R. F. Dasher having brought the said Order here upon his petition for review and the Court having heard and considered the arguments of respective counsel and having considered the error assigned by the said R. F. Dasher, and it appearing to the satisfaction of the Court that the said Order of the Referee is just and correct and conforms to the law and the evidence and is supported by

clear and convincing evidence, and this Court having announced at the oral argument of this cause April 9th, 1932, its intention to enter this Order confirming the said Order of the Referee, but, having postponed the entry thereof until this date at the request of the Attorneys for the said R. F. Dasher,

It is hereby ordered, adjudged and decreed that the Order of the Honorable H. P. Baya, Referee in Bank-[fol. 37] ruptcy, entered in the above entitled cause on December 10th, 1931, requiring the said R. F. Dasher to turn over and deliver to Frank E. Cooper, as Trustee herein, the property hereinabove referred to, be, and the same is, hereby approved, sustained and affirmed.

It is further ordered, adjudged and decreed that said R. F. Dasher do, within one (1) day from this date, turn over and deliver unto the said Frank E. Cooper, as such Trustee, each, all and every of the property mentioned, described, and/or referred to in the said Order.

Done and ordered at Chambers, this 26th day of April, A. D. 1932.

(Signed) Alexander Akerman, District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 25, 1932

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Judicial Circuit:

Your Petitioner, R. F. Dasher, President of the bankrupt corporation above named, conceiving himself aggrieved by the Order made by the Honorable Alexander Akerman, one of the Judges of the United States District Court for the Southern District of Florida, sitting in bankruptcy, on the 26th day of April, A. D. 1932, denying the Petition for review filed by your Petitioner, and affirming an order made by H. P. Baya, Referee in charge of said bankruptcy, [fol. 38] files this, his Petition, addressed to the discretion of this Honorable Court, for leave to appeal in matter of law from such order of the District Court, sitting in bankruptcy.

Petitioner refers to the Assignment of Errors filed herein by him simultaneously with this petition as setting

forth the errors made by the Court below and stating the grounds for this appeal, and makes said Assignment of Errors a part hereof.

Petitioner represents that on an involuntary petition in bankruptcy filed in the above Court on the 23rd day of February, A. D. 1931, the above named, Wauchula Central Pharmacy, Inc., was thereafter duly adjudged bankrupt, whereupon further proceedings therein were duly referred to H. P. Baya, Esquire, one of the Referees of said Court in Bankruptcy, before whom such proceedings thereafter were had, as resulted in the appointment of Frank E. Cooper, as Trustee of said bankrupt's estate and effects, who thereupon qualified as such and has ever since been, and now is the duly qualified and acting trustee in bankruptcy herein.

Thereafter, subsequent to the examination of your Petitioner as President of said bankrupt corporation, and the taking of other evidence, said trustee in bankruptcy filed his petition with said Referee to require your Petitioner to turn over to him as such trustee in bankruptcy certain property not specifically described, as above set forth, to which petitioner filed a response. Thereupon, after the taking of additional evidence, said Referee in Bankruptcy entered his Order on the 10th day of December, A. D. 1931, making findings of fact and directing and commanding your Petitioner to turn over within 10 days from said date the property described as aforesaid. Whereupon, your Petitioner duly filed his Petition for Review of said Order, and said Referee duly filed his Certificate, accompanied by [fol. 39] a copy of said Order containing findings of fact, the evidence upon which the same were based, and a statement of the points involved.

Said Petition for Review came on to be heard before the Honorable Alexander Akerman, one of the Judges of said Court, who upon consideration thereof entered an Order confirming the Order of the Referee in words and figures following, to-wit:

"Frank E. Cooper, as Trustee in Bankruptcy in the above matter, having on July 7th, 1931, filed a petition with the Referee to require R. F. Dasher, President and sole executive manager of the bankrupt corporation, to turn over and deliver certain assets of the bankrupt corporation

to the said Trustee, and the said R. F. Dasher having objected to the jurisdiction of the Referee and of this Court to inquire into the matters referred to in the said petition in a summary proceedings, and said objection having been overruled by the Referee, and, thereafter the said R. F. Dasher having made answer on July 14th, 1931, and, thereafter after the receipt of voluminous evidence the Referee having on December 10th, 1931, entered an Order directing the said R. F. Dasher to turn over and deliver to the Trustee in Bankruptcy herein certain enumerated assets found by the said Referee to have been withheld by the said R. F. Dasher from the said Trustee, minutely described with great particularity in the said Order, and, also, certain other assets consisting of goods, wares and merchandise of a value of Nineteen Thousand One Hundred Fifty-seven and 66/100 Dollars ($19,157.66), being the character of goods, wares and merchandise such as was shown by the proofs of claim in this cause to have been purchased by the bankrupt corporation, and such as is usually carried, sold, and offered for sale in drug stores of the character operated by the bankrupt corporation prior to bankruptcy, and being exclusively goods, wares and merchandise purchased [fol. 40] by and delivered to the said bankrupt corporation and withheld by the said R. F. Dasher from the officers of this Court at the time of bankruptcy, and the said R. F. Dasher having brought the said Order here upon his petition for review and the Court having heard and considered the arguments of respective counsel and having considered the error assigned by the said R. F. Dasher, and it appearing to the satisfaction of the Court that the said Order of the Referee is just and correct and conforms to the law and the evidence and is supported by clear and convincing evidence, and this Court having announced at the oral argument of this cause April 9th, 1932, its intention to enter this Order confirming the said Order of the Referee, but, having postponed the entry thereof until this date at the request of the Attorneys for the said R. F. Dasher,

It is hereby ordered, adjudged and decreed that the Order of the Honorable H. P. Baya, Referee in Bankruptcy, entered in the above entitled cause on December 10th, 1931, requiring the said R. F. Dasher to turn over and deliver to Frank E. Cooper, as Trustee herein, the property herein-

above referred to, be, and the same is, hereby approved, sustained and affirmed.

It is further ordered, adjudged and decreed that said R. F. Dasher do, within one (1) day from this date, turn over and deliver unto the said Frank E. Cooper, as such Trustee, each, all and every of the property mentioned, described, and/or referred to in the said Order.

Done and ordered at Chambers, this 26th day of April, A. D. 1932.

(Signed) Alexander Akerman, District Judge.

Petitioner avers that said Order of the District Court is erroneous in matter of law in the particulars specified in [fol. 41] the Assignment of Errors, herewith filed, and said errors are such as will result in a wrongful adjudication against your Petitioner which may subject him to imprisonment or other serious punishment for failure to comply with the said Order, although he is now, and has ever been since the filing of the involuntary petition in bankruptcy against him wholly unable to comply therewith.

Wherefore your Petitioner prays that the discretion of this Court be exercised in favor of his appeal in matter of fact and/or law herein; that a citation be issued directed to said Frank E. Cooper, Trustee in Bankruptcy of said Estate of Wauchula Central Pharmacy, Inc., bankrupt, who is made respondent hereto, commanding him to appear before this Honorable Court to do and receive what may appertain to justice in the premises; that a transcript of such part of the record and proceedings herein as may be material to the determination of the question of law raised by the assignment of errors aforesaid, duly authenticated, be transmitted to this Honorable Court by the Clerk of the said Court of Bankruptcy; that upon the allowance and the hearing of petitioner's appeal the order of April 26, 1932, be reversed and vacated, and said Court be directed to reverse and vacate the order of the Referee in Bankruptcy entered on the 10th day of December, 1931, and that this petitioner be allowed to prosecute this appeal in forma pauperis, and that petitioner have such other and further relief as may comport with legal principles properly applicable.

Burton G. Henson, Attorney for Petitioner.

Affidavit of insolvency attached hereto and made a part hereof.

[fol. 42] *Duly sworn to by R. F. Dasher. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed May 25, 1932

Comes now R. F. Dasher, the party against whom, as President of the bankrupt corporation, an order was made on the 26th day of April, A. D. 1932, affirming an order of the Referee requiring him to turn over to the Trustee in Bankruptcy herein certain property in said order referred to, and having prayed for the allowance of an appeal from said order, assigns the following as the errors committed by the Bankruptcy Court in its said order of April 26th, 1932:

I

Because it affirmed the order of the Referee entered on December 10th, 1931, requiring the petitioner to turn over [fol. 43] to respondent the goods therein referred to without any evidence that the petitioner had possession of the goods or that petitioner had ability to secure them.

II

Because neither said order nor the order of the Referee, which was thereby affirmed, was based upon sufficient findings of fact to warrant same.

III

Because the same was not based upon or warranted by sufficient findings of fact, in that there was no finding of the ability of petitioner to obey the same at any time since the filing of the petition in bankruptcy.

IV

Because neither said order nor the order of the Referee thereby affirmed sufficiently identified, designated or de-

scribed the property ordered to be turned over by petitioner.

V

Because neither said order nor the order of the Referee thereby affirmed described the property ordered to be turned over with reasonable certainty in order to assure its identity as property belonging to the bankrupt estate.

VI

Because neither said order nor the order of the Referee thereby affirmed directed petitioner to turn over to respondent any specific goods found to have belonged to the bankrupt, but simply directed the delivery of goods "being the character of goods, wares and merchandise such as was [fol. 44] shown by the proofs of claim in this cause to have been purchased by the bankrupt corporation, and such as is usually carried, sold and offered for sale in drug stores of the character operated by the bankrupt corporation prior to bankruptcy, and being exclusively goods, wares and merchandise purchased by and delivered to the said bankrupt corporation and withheld by the said R. F. Dasher from the officers of this Court at the time of bankruptcy."

VII

Because the findings made by the Referee upon which said order was based did not warrant the same, in view of the positive denial in the answer of petitioner to the petition praying such an order that he had either possession or control of any goods, wares or merchandise belonging to the bankrupt estate.

VIII

Because the order attempted in a collateral in bankruptcy proceeding to compel petitioner to deliver to the Trustee in Bankruptcy property not shown to have been transferred to him from the Bankrupt within four months before the filing of the involuntary petition in bankruptcy and while the Bankrupt was insolvent.

IX

Because there was no evidence that petitioner received any property from the bankrupt after the filing of the in-

voluntary petition in Bankruptcy, or within four months prior thereto.

[fol. 45]

X

Because the evidence does not show that petitioner "concealed" any property belonging to the bankrupt within the definition of the Bankruptcy Act.

XI

Because your petitioner is not an attorney, counselor at law, solicitor in equity or proctor in admiralty and the Referee had no right or authority to re-examine any transfer of property to this petitioner on the petition of the Trustee or any creditor, as was done in the instance complained of, but the rights of the Trustee, if any, should be established by a suit in equity in the nature of a creditor's bill.

XII

Because the order of the Referee and/or Referee does not establish the money value or present existence of said goods or direct that their money value be turned over to the Trustee.

XIII

Because the Trustee, pursuant to the direction of the Court, did not submit the controversy between the Trustee and your petitioner in the settlement of the estate to arbitration as approved by Section 26 of the Bankruptcy Laws of the United States.

XIV

Because the order is arbitrary and unjust.

Wherefore petitioner prays that the order appealed from may be vacated, set aside and reversed.

Burton G. Henson, Attorney for Petitioner.

[fol. 46] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING PETITIONER TO PERFECT APPEAL, ETC.

The Petition for an Appeal in forma pauperis from an order of this Court dated the 26th day of April 1, 1932,

together with the Assignment of Errors having been filed in this Court on the 25th day of May, 1932, together with an Affidavit of Insolvency on behalf of the Petitioner, R. F. Dasher, in the above entitled cause, it is,

Ordered that the petition in forma pauperis be denied, but said Petitioner is hereby allowed to perfect his appeal and is allowed sixty (60) days from May 25th, 1932, in which to prepare and file Transcript and tender and file a condensed and narrative statement of the evidence submitted before the Referee in Bankruptcy or so much of same as to present the questions of law and fact to which the Petitioner assigns error, but nothing in this order shall obligate the Petitioner to file a statement of the testimony should he rely on errors appearing on the face of the record alone.

It is further ordered that citation be prepared and issued by the Clerk of this Court directed to Frank E. Cooper, Trustee in Bankruptcy in the above entitled cause.

Done and ordered in Chambers in Tampa, Florida, this the 2nd day of June, A. D. 1932.

Alexander Akerman, Judge.

[fol. 47] IN UNITED STATES DISTRICT COURT

NOTICE AS TO CONTENTS OF TRANSCRIPT OF RECORD

To the Honorable C. Edmund Worth, attorney for trustee in bankruptcy, First National Bank building, Tampa, Florida:

Please take notice that the undersigned has in accordance with the Order Allowing Appeal entered by the District Judge on the 2nd day of June 1932 allowing the appeal but denying the same in forma pauperis over the objections of the Attorney for the Trustee, has caused to be made a Transcript of the Record in this cause of all those Petitions, Answers, Orders and Decrees pertaining to the appeal of R. F. Dasher from the turn-over order of the Referee in Bankruptcy dated the 10th day of December 1931, and has on account of the financial inability of the said R. F. Dasher to pay for the preparation and printing of a narrative statement of the evidence submitted before the

Trustee in Bankruptcy, caused the statement of the testimony to be omitted from said record and in accordance with the Order of Appeal issued by the District Judge the Appellant has elected to rely upon errors appearing on the face of the record.

Further take notice that if you know of any pertinent portion of the record necessary for the proper adjudication of the appeal taken, please give notice to the Clerk to include the same in the Transcript of Record, or a supplemental record, within the time allowed by the Rules of Court.

For your further information the prepared record now consists of the following:

[fol. 48] (1) Amended Involuntary Petition in Bankruptcy.

(2) Order of Adjudication and Reference.

(3) Petition of Frank E. Cooper, Trustee in Bankruptcy, for an order upon R. F. Dasher, President of the bankrupt corporation, to turn over assets of the bankrupt fraudulently withheld.

(4) Response of R. F. Dasher to the Petition to turn over assets.

(5) Order of H. P. Baya, Referee in Bankruptcy, directing R. F. Dasher to turn over assets, including findings of fact.

(6) Petition of R. F. Dasher for review of said Order by the District Judge.

(7) Certificate of Review directed to the District Judge by the Referee in Bankruptcy.

(8) Order of the District Judge on review sustaining the Order of the Referee requiring R. F. Dasher to turn over assets.

(9) Petition of R. F. Dasher for allowance of Appeal from Order to turn over assets to the Court of Appeals.

(10) Assignment of Errors by R. F. Dasher upon his said Petition for allowance of Appeal.

(11) Order Allowing Appeal.

(12) Citation of Appeal.

This the 19th day of July, A. D. 1932.

Burton G. Henson, Attorney for R. F. Dasher, Appellant.

[fol. 49] Certificate

I, Burton G. Henson, do hereby certify that I am attorney for R. F. Dasher, Appellant in the above matter; that I personally delivered to C. Edmund Worth, attorney for the Trustee in Bankruptcy in the above entitled cause a true copy of the above Notice; that previous thereto a copy of the Petition for Appeal and the Assignment of Errors was delivered to the said C. Edmund Worth as well as a copy of the Order of Appeal together with a copy of the Citation of Appeal in the above cause.

That the said original Transcript of the Record prepared by the Clerk is, and has been accessible to the said Attorney for the Trustee for a long period of time. The same has been filed with the Clerk of the United States District Court for the Southern District of Florida with instructions to forward the same to the Clerk of the Circuit Court of Appeals at New Orleans, Louisiana on or before sixty days from May 25th, 1932, with whatever pleadings and record filed in said cause on or before June 2nd, 1932, exclusive of the testimony, that the Attorney for the Trustee may desire to prepare, without expense to the Appellant, pertaining to the said turn-over order filed in said cause.

This the 19th day of July, A. D. 1932.

Burton G. Henson, Attorney for R. F. Dasher, Appellant.

[fol. 50] In United States District Court

Præcipe for Transcript of Record

To the clerk of the above-styled court:

You will please make up a Transcript of Record for the United States Circuit Court of Appeals for the Fifth Circuit in the above styled cause on the Petition for Appeal of R. F. Dasher, and include therein the following papers and cause the same to be filed with the Clerk of the Circuit Court of Appeals on or before sixty (60) days from May 25th, 1932:

1. Amended Involuntary Petition in Bankruptcy.
(2) Order of Adjudication and Reference.

(3) Petition of Frank E. Cooper, Trustee in Bankruptcy, for an order upon R. F. Dasher, President of the bankrupt corporation, to turn over assets of the bankrupt fraudulently withheld.

(4) Response of R. F. Dasher to the Petition to turn over assets.

(5) Order of H. P. Baya, Referee in Bankruptcy, directing R. F. Dasher to turn over assets, including findings of fact.

(6) Petition of R. F. Dasher for review of said Order by the District Judge.

(7) Certificate of Review directed to the District Judge by the Referee in Bankruptcy.

(8) Order of the District Judge on review sustaining the Order of the Referee requiring R. F. Dasher to turn over assets.

(9) Petition of R. F. Dasher for allowance of Appeal from Order to turn over assets to the Court of Appeals.

[fol. 51] (10) Assignment of Errors by R. F. Dasher upon his said Petition for allowance of Appeal.

(11) Order Allowing Appeal.

(12) Citation of Appeal.

(13) Notice to C. Edmund Worth filed July 19th, 1932.

(14) Any affidavits or pleadings or orders that may be found or filed or requested by the attorney for the Trustee in Bankruptcy in the record in the above cause, pertaining to a turn over order entered on the 10th day of December, 1931, directed against R. F. Dasher, the appellant herein.

(15) Recite in its proper place the filing of this præcipe and insert the same in full.

(16) Attach to said Transcript of Record your certificate and the seal of this Court and cause the same to be filed in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Inasmuch as the attorney for the Trustee in Bankruptcy has not as yet decided whether he desires any corrections, amendments, or additions to the above record filed in the Circuit Court of Appeals, you will please make up as a supplemental record any additional record that he so desires to file and forward the same to the Clerk of the Circuit Court of Appeals in accordance with his instructions.

Burton G. Henson, Attorney for Appellant.

Copy of the above præcipe for transcript of record received this the 21st day of July, A. D. 1932.

C. Edmond Worth, Attorney for Trustee in Bankruptcy.

[fol. 52] Clerk's certificate to foregoing transcript omitted in printing.

NOTE RE CITATION

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 6728

R. F. DASHER

versus

FRANK E. COOPER, Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt

ORDER ALLOWING APPEAL—December 20, 1932

It is ordered that the appeal applied for in the above numbered and entitled cause be allowed.

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION TO DISMISS—Filed February 16, 1933

Now comes the Appellee in the above entitled cause, by his undersigned Attorney, under the protection of the

Special Appearance heretofore entered and without waiving the Motion to deny and to dismiss the appeal heretofore filed, and further moves to dismiss this appeal for the reason that the Appellant did not file with the Clerk of the above styled Court, at least fifteen days before the case was set for argument, twenty copies of a printed brief, and did not, within such time, furnish a copy thereof to counsel for the Appellee, in compliance with Rule XXIV of the Rules of the United States Circuit Court of Appeals, for the Fifth Circuit.

(Signed) C. Edmund Worth, Attorney for Appellee.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

NOTICE OF HEARING AND ACCEPTANCE OF COUNSEL FOR APPELLANT

To Honorable Burton G. Henson, attorney for appellant:

You will please take notice that appellee has filed additional motion to dismiss this appeal, copy of which is handed you herewith, and will call up for hearing both this Motion, and the former Motion heretofore filed, before the United States Circuit Court of Appeals for the Fifth Circuit on Tuesday, February 21st, 1933, at nine o'clock (9:00) A. M. or as soon thereafter as Counsel may be heard, and govern yourself accordingly.

(Signed) C. Edmund Worth, Attorney for Appellee.

I hereby accept notice of the above hearing, as well as copy of said additional Motion to Dismiss, this 15th day of February, A. D. 1933.

(Signed) Burton G. Henson, Attorney for Appellant.

[fol. 56] Minute entry of argument and submission, February 21, 1933, omitted in printing.

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6728

R. F. DASHER, Appellant,

versus

FRANK E. COOPER, Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt, Appellee

Appeal from the District Court of the United States for the Southern District of Florida

Before Bryan, Foster and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed March 10, 1933

HUTCHESON, Circuit Judge:

Upon the petition of the trustee for a turnover order, the referee found that after making full allowance for all merchandise, received by and otherwise accounted for, to the proper officers of the court, there was a balance of merchandise in the hands of appellant as president, manager, [fol. 58] and sole custodian of the bankrupt corporation at the time of the bankruptcy unaccounted for, of the value of $19,157.66, "of a class of merchandise shown by the proofs of claims to have been purchased on the credit of the bankrupt corporation, and delivered to it, and of such a class of merchandise as it usually carried and sold in a retail drug store, but which is not capable of more specific description, which specific description is known only to the respondent in the cause."

The turnover order based on this finding followed it literally. It required the appellant to turn over to the trustee $583.69 of merchandise specifically described in the order, and further ordered him to turn over and deliver to the trustee "other goods, wares and merchandise of the bankrupt corporation, purchased and owned by the bankrupt, and withheld from the officers of the court at the time of the bankruptcy by him, of the value of $19,157.66, said goods, wares and merchandise being of the character of goods, wares and merchandise such as is shown by the

proofs of claim in this cause to have been purchased by the bankrupt corporation, and such as is usually carried, sold and offered for sale in drug stores of the character operated by the bankrupt corporation prior to bankruptcy, and being exclusively goods, wares and merchandise purchased by and delivered to the bankrupt corporation and withheld by Dasher from the officers of this court at the time of the bankruptcy."

This appeal is from a decree affirming that order.

Appellee, urging objections to the manner and form of the appeal, moves to dismiss it. None of the grounds urged are fatal to the review. The order complained of "represented a serious step in the bankruptcy proceedings * * * one in which coercive methods are probable and are foreshadowed." Oriel vs. Russell, 278 U. S. 363-4. Whether the order is a valid one presents a question of [fol. 59] grave importance not only to appellant, but in the administration of bankrupt estates. The motion to dismiss the appeal is denied.

Appellant, claiming that he is a third party and not subject to summary orders, attacks the jurisdiction of the court to make the turnover order against him. He urges against the order that it is void as to the specifically described goods, because not in the alternative for the goods or their money equivalent. He also, and this is his main point, attacks the order as to the undescribed and unidentified merchandise as wholly void for indefiniteness.

We think it quite clear that the court had jurisdiction to proceed summarily against appellant, and that the complaint against the turnover order as to the definitely described goods is without merit. If, as the referee finds, appellant, the president, manager, and sole custodian of the property of the bankrupt, has been "withholding from the officers of the court at the time of adjudication in bankruptcy and at all subsequent times" the goods specifically described in the order, he was subject to the turnover order entered as to those goods. If when he comes to comply with the order, he can show that the specifically described goods or any part of them are no longer in his possession, since the order is not a penal but an administrative one, the court has the power, though the turnover order does

not so provide, to permit the payment of their money equivalent. That much of the order, therefore, is affirmed.

The case stands quite differently, however, as to the vague and incoherent order for the turnover of the unidentified and unidentifiable merchandise "of the cost price value of $19,157.66." This order is void. The jurisdiction here exercised is a civil jurisdiction; "it constitutes a mere step in [fol. 60] the proceedings to administer the assets of the bankrupt, as provided by law and in aid of the seizure of those assets and their proper distribution." Oriel vs. Russell, 278 U. S. 363. It is not the exercise of a jurisdiction to imprison to compel payment of a debt, or of a criminal jurisdiction to imprison in default of the payment of a fine. The first is prohibited by the Constitution; the second is provided for in the Penal Code. The jurisdiction asserted is based upon the power of courts to compel compliance with specific orders which the person subjected to them is able to comply with. Jurisdiction to make the orders depends upon a specific finding on clear and satisfactory evidence that the respondent can comply with the order because the moneys or goods ordered turned over are in his possession. Such orders must be based upon clear and convincing evidence; they must be couched in definite and comprehensible terms, they must leave no uncertainty as to what is ordered to be done, no doubt whether goods or property tendered in satisfaction of the order are those ordered surrendered. The questioned order violates these requirements. It cannot be complied with. It describes nothing, it identifies nothing. The respondent himself could not safely undertake to comply with it, nor could any officer of the court safely compel him. It has always been the rule in this circuit that such an order is void. Samuel vs. Dodd, 142 Fed. 68; Opinions from other circuits, citing, approving and adopting the rule, are Miller vs. Harbaugh, 54 Fed. (2) 612; In re Goldman, 62 Fed. (2) 421.

The turnover order, in so far as it directed the turnover of the specifically described merchandise, in the amount of $583.69, is affirmed. In so far as it directed the turnover of unnamd, undescribed, and unidentified articles of merchandise to the extent of $19,157.66 it is reversed with directions to vacate that part of the order and all proceed- [fol. 61] ings which have been taken under it.

[fol. 62] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6728

R. F. DASHER

versus

FRANK E. COOPER, Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt

JUDGMENT—March 10, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the turnover order of the said District Court appealed from in this cause in so far as it directed the turnover of the specifically described merchandise, in the amount of $583.69 is affirmed, and in so far as it directed the turnover of unnamed, undescribed, and unidentified articles of merchandise to the extent of $19,157.66 it is reversed, with directions to vacate that part of the order and all proceedings which have been taken under it;

It is further ordered, adjudged and decreed that the appellee, Frank E. Cooper, Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt, be condemned to pay the costs of this cause in this Court, in due course of the administration of the estate of said Bankrupt.

[fol. 63] IN UUITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed March 23, 1933

Now comes the Appellee in the above entitled cause and gives notice that he intends to apply to the Supreme Court of the United States of America for Writ of Certiorari to

the Decree of this Court entered March 10th, 1933, and moves the Court to enter herein an Order staying the issuance of the Mandate of this Court as required by Rule XXXII of the Rules of this Court for the period of three (3) months and thereafter until such Petition for Certiorari if filed within three months shall be acted upon by the Supreme Court of the United States of America, as provided by Title 28, Section 350 of The United States Code (Acts of Congress, February 13, 1925, Section 8) and to fix the terms and conditions upon which such Stay shall be granted, and in conformity with Rule 38 (6) of the Rules of The Supreme Court of the United States of America as amended May 31st, 1932.

(Signed) C. Edmund Worth, Solicitor for Appellee.

[fol. 64] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

[Title omitted]

ORDER STAYING MANDATE

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 23rd day of March, 1933.

(Signed) N. P. Bryan, United States Circuit Judge.

[fol. 65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 15, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,585. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 30. Frank E. Cooper, as trustee in bankruptcy of Wauchula Central Pharmacy, Inc., bankrupt, petitioner, vs. R. F. Dasher. Petition for a writ of certiorari and exhibit thereto. Filed April 18, 1933. File No. 37,585.

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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FRANK E. COOPER, AS TRUSTEE OF WAUCHULA CENTRAL PHARMACY, INC., A BANKRUPT, PETITIONER,

VS.

R. F. DASHER, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT.

The petitioner, Frank E. Cooper, as trustee in bankruptcy in the matter of Wauchula Central Pharmacy, Inc., a bankrupt, prays that a writ of certiorari issue to review the decree of the United

States Circuit Court of Appeals for the Fifth Circuit entered on March 10, 1933 (R. 60), affirming in part and reversing in part an order of the District Court of the Southern District of Florida entered on April 26, 1932 (R. 35-37), which had affirmed an order of the referee of that District Court dated December 10, 1931 (R. 19-28), requiring respondent to turn over certain assets of the bankrupt.

QUESTION PRESENTED.

The question presented is single:

Whether a turnover order in bankruptcy requiring a bankrupt or his agent to deliver to the trustee assets of the bankrupt which describes the property to be delivered:

(a) By its cost price to the bankrupt;

(b) By its value;

(c) By its being exclusively merchandise purchased by and delivered to the bankrupt and withheld by a named agent at date of bankruptcy;

(d) By its being of a class of merchandise shown by the proofs of claim in bankruptcy to have been charged to the bankrupt; and,

(e) By its being of the class of merchandise usually carried for sale in a retail drug store of the character operated by the bankrupt,

is void for uncertainty in the description of the merchandise?

STATEMENT OF THE CASE.

On February 26, 1931, amended involuntary petition in bankruptcy was filed by certain creditors against Wauchula Central Pharmacy, Inc., on grounds among others of recent transfers of corporate assets to respondent Dasher, the corporation's president (R. 5), and of concealing other assets (R. 6 and 7). Adjudication followed March 21, 1931 (R. 11). Thereafter the petitioner herein, having qualified as trustee, filed petition before the referee showing that Dasher was sole custodian of the corporation's assets and that he withheld merchandise, or the proceeds thereof to the amount of $23,101.84 from the trustee and praying for a rule on him to show cause why he should not turn the same over (R. 12-15). Respondent answered denying the referee's summary jurisdiction because, among other reasons, the property delivery of which trustee sought was not sufficiently specifically described to admit compliance on his part and generally denying possession or control of any property of the bankrupt (R. 16-18). Voluminous testimony was taken which is not in the record (R. bottom 19, top 20).

On December 10, 1931, the referee entered his order (R. 19-28) finding that the great bulk of the assets recovered by the receiver at the institution of bankruptcy were taken from secret hiding places (some of them far in the woods), (R. 20-21) whose existence was concealed from all other employees of the corporation save Dasher, to which it had been moved in the nighttime within a few days before bankruptcy (and some

even after the petition had been filed) (R. 21) by other trucks than those usually employed in his business (R. 22) in original containers (but with all marks of identification defaced) (R. 22) and in repacked and reinventoried cartons (R. 22), a veritable wholesale stock owned by a little country drug store and when bankruptcy intervened in a state of flux between garages, bedrooms, dairy sheds and deserted shanties in the woods, all, however, under the guiding genius of Dasher its exclusive custodian (R. 22); that during the merchandise fluxation Dasher had by sham bill of sale placed title to the store fixtures in his individual name as well as the lease on the corporation's only place of business (R. 22-23); that some seven months after bankruptcy some eight boxes of cigars from the bankrupt's stock were found in Dasher's possession (R. 22 and 27) and that his home was largely furnished with bankrupt's property—rugs, towels, bed clothes, wearing apparel, electric fixtures, etc., (R. 22 and 27).

With these findings as background to throw light on any question of premeditated fraud as opposed to inadvertence the referee further found: that Dasher was at all times sole custodian of the bankrupt's merchandise; that the corporation started business nine months before bankruptcy with merchandise worth at least $8,500.00 (this was Dasher's own figure on the stand—his books showed more); that it received during its nine months life new merchandise costing it $64,051.82 (this from books kept by Dasher himself); making a total merchandise received of $72,551.82; that it sold merchandise of a *retail* value of $30,741.34 which

from Dasher's testimony included a profit of $7,685.33, leaving a *cost* value of merchandise sold of $23,056.01 with which he was credited; that the actual *cost* value of merchandise seized by the bankruptcy court (after all allowance for possible error) amounted to $29,754.46 with which he was credited; making the total merchandise accounted for of $52,810.47, and unaccounted for of $19,741.35. Thereupon the referee ordered the delivery of the cigars, rugs, bed clothes, clothing, fixtures, etc., (whose specific description he had been able to discover because they had been located) by that specific description (R. 26-27) and deducting their value —$583.69—from the shortage, determined that the remainder of the shortage was merchandise of a cost price value of $19,157.66 "of a class of merchandise shown by the proofs of claim to have been purchased on the credit of the bankrupt corporation and delivered to it, and, of such a class of merchandise as is usually carried and sold in a retail drug store, but which is not capable of a more specific description, such more specific description being known only to the respondent in this cause" (R. 26) and ordered respondent to turn over such "goods, wares and merchandise of the said bankrupt corporation purchased and owned by the said bankrupt corporation, and withheld from the officers of this Court at the time of bankruptcy by the said R. F. Dasher, of a value of $19,157.66, said goods, wares and merchandise being of the character of goods, wares and merchandise such as is shown by the proofs of claim in this cause to have been purchased by the bankrupt corporation and such as is usually carried, sold,

and offered for sale in drug stores of the character operated by the bankrupt corporation prior to bankruptcy, and being exclusively goods, wares, and merchandise purchased by and delivered to the said bankrupt corporation and withheld by the said R. F. Dasher from the officers of this Court at the time of bankruptcy" (R. 28).

The district judge on review affirmed the referee's order in its entirety April 26, 1932 (R. 35-37).

On appeal, however, the Circuit Court of Appeals for the Fifth Circuit (Judges Bryan, Foster and Hutcheson, sitting) reversed that part of the order for the $19,157.66 in value described by the general description and affirmed it only as to the $583.69 in value minutely described by items (R. 60) expressing the opinion (Judge Hutcheson writing) that the order was void as to the $19,157.66 worth of merchandise described generally for uncertainty of description (R. 56).

The Circuit Court of Appeals was deprived of a proper brief of appellee (petitioner here) by failure of appellant (respondent here) to furnish a copy of his brief on time and failure to file it until the day before appellee's reply thereto was due. Our brief below was, therefore, hastily prepared and incomplete. Motion to dismiss the appeal for appellant's failure to observe the rule in filing brief (R. 53) was denied (R. 57).

STATUTES INVOLVED.

The authority for the proceeding is found in ~~Chapter 2~~, Section ~~11~~ 2 of the Act of Congress relating to bankruptcy of July 1, 1898, as amended (Title 11 Sec 11 U.S.C.A.), subsection (7), empowering courts of bankruptcy to:

> "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;"

and, subsection (15) authorizing such courts to:

> "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

REASONS FOR GRANTING THE WRIT.

I. **Conflict of Decisions Between Circuits.**—The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case, while in harmony with the decision of the Ninth Circuit (*Re Miller & Harbaugh*, 54 Fed. (2d) 612), is in conflict with the decisions of the Second Circuit (*In re D. Levy & Co.*, 142 Fed. 442, 73 C. C. A. 558; In Re H. Magen Co. 10 Fed (2) 91 *In re Prela*, 23 Fed. (2d) 413); the Third Circuit (*Epstein* v. *Steinfeld*, 210 Fed. 236, 127 C. C. A. 54; *Hirsch* v. *Schilling*, 28 Fed. (2d) 171;

In re H. Magen Co., 10 Fed. (2d) 91; *Sheinman* v. *Chalmers*, 33 Fed. (2d) 902; *In re Cohan*, 41 Fed. (2d) 632); and the Fourth Circuit (*Kirsner* v. *Taliaferro*, 20 Fed. 51, 120 C. C. A. 305). In fact, the court below in its opinion cites only two authorities outside its own circuit for its holding *Re Miller & Harbaugh, supra*, in which the Ninth Circuit Court of Appeals invites review by this Court in these words:

> "It must be conceded that our decision is in direct conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit. We call attention to this conflict in order that it may be considered by the Supreme Court" (Text 616).

and, *In re Goldman*, 62 Fed. (2d) 421, in which the Circuit Court of Appeals of the First Circuit says:

> "The District and Circuit Courts of Appeals are not in entire accord as to the form which the turnover order may take" (Text 424).

II. Conflict With Decision of This Court.—It is respectfully submitted that the Circuit Court of Appeals herein has decided an important question of federal law in a way probably in conflict with an applicable decision of this Court, to-wit: Prela vs. Hubshman, which is reported jointly with *Oriel* v. *Russell* in 278 U. S. 358, 73 L. Ed. 419. In the Prela case it appears that the turnover order there enforced by contempt proceedings was no more definite than

that in the case at bar, and certainly would not have passed the test which the Fifth Circuit lays down in its opinion below. Authorities cited and approved in the opinion of this Court in the Prela case, we think also sufficient to justify the inference that this Court in that opinion intended to adopt the rule applied in the Second, Third and Fourth Circuits.

III. Important Question of Federal Law Which Should Be Settled.—If the Prela case did not decide the important question of federal law involved in the instant case, to-wit: Whether bankruptcy courts are powerless to compel delivery of assets which, because of the fraud of the bankrupt, cannot be particularly and minutely described in the turnover order, it is respectfully submitted that this important question of federal law should be settled by this Court. With bankruptcy courts taxed to their utmost by the present volume of failures, with the business world stunned at the amount of fraudulent concealments bankrupts are able successfully to accomplish, it is important that a uniform rule be laid down by this Honorable Court to determine just how effective or how impotent the processes of the bankruptcy courts may be in gathering secreted assets of bankrupts. Referees and trustees, throughout the nation, are daily faced with the problem: Can they demand delivery of concealed assets which only the person who conceals them can describe with minute

particularity? It is submitted that this Court should by its decree establish a uniform answer to that question.

Wherefore, it is respectfully submitted that this petition for certiorari to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

C. EDMUND WORTH,
Counsel for Petitioner.

Dated April 15, 1933.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the referee, Honorable H. P. Baya, is incorporated in his order (R. 19-28). The district judge expressed no opinion except to confirm the referee's holding (R. 35-37). The opinion of the Circuit Court of Appeals (Circuit Judges Bryan, Foster, and Hutcheson sitting—Judge Hutcheson writing) was filed March 10, 1933, and appears in the transcript of the record at pages 56 to 60.

Jurisdiction.

The jurisdiction of this Court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A. Title 28, Section 347.

The date of the decree, of which review is sought in this proceeding, is March 10, 1933 (R. 60).

Statement of the Case.

The facts have been stated in the petition which this brief accompanies (see pages 1 to 10, *ante*).

Summary of Argument.

As stated in the petition, but one question is presented:

> "Whether a turnover order in bankruptcy requiring a bankrupt or his agent to deliver to the

trustee assets of the bankrupt which describes the property to be delivered:

(a) By its cost price to the bankrupt;

(b) By its value;

(c) By its being exclusively merchandise purchased by and delivered to the bankrupt and withheld by a named agent at date of bankruptcy;

(d) By its being of a class of merchandise shown by the proofs of claim in bankruptcy to have been charged to the bankrupt; and,

(e) By its being of the class of merchandise usually carried for sale in a retail drug store of the character operated by the bankrupt

is void for uncertainty in the description of the merchandise."

The decision of the Circuit Court of Appeals answered this question in the affirmative. It is submitted that this decision presents:

(1) Conflict of decisions between circuits.

(2) Conflict with decision of this Court.

(3) An important question of federal law which should be settled.

The question will be discussed from these three aspects.

ARGUMENT.

I.

Conflict of Decisions Between Circuits.

The Ninth Circuit.

It must be conceded that the decision of the Circuit Court of Appeals in the instant case is supported by the opinion of *In re Miller & Harbaugh*, 54 Fed. (2d) 612, from the Ninth Circuit. While the order in that case was possibly not so specific as the one here involved the language of the opinion is broad enough to rule the order in the instant case fatally deficient. As we have seen, the opinion in that case called this Court's attention to its conflict with the decision of another circuit (Text 616).

The First Circuit.

But, while the Ninth Circuit and the Fifth Circuit hold that a turnover order in this form is void, we think no other circuit so holds. It is submitted that *In re Goldman*, 62 Fed. (2d) 421, cited below, does not commit the First Circuit to that view. As we read the Goldman case it goes off on the rule that where the referee find only that the bankrupt is concealing assets "in some form" (Text 423), with no finding as to whether it is "merchandise, real estate, bills receivable, or money, or assets in some other form" (Text 424), he could not force the bankrupt

to turn over the shortage *in money*. This, we thought, until the present decision, was the rationale of *Samel* v. *Dodd*, 142 Fed. 68, 73 C. C. A. 254, as interpreted in *Stuart* v. *Reynolds*, 204 Fed. 709, 123 C. C. A. 13, and the rule in the Fifth Circuit, although we recognized that Judge Shelby, formerly of that bench, in separate concurring and dissenting opinions in these cases, as well as *In re Purvine*, 96 Fed. 192, 37 C. C. A. 446, did strongly urge the lack of power in the bankruptcy court to issue turnover orders except where they were so specific in themselves that they would enable the marshal positively to identify the goods from the description in the order. But, it was not until the instant case that the majority of the Court in the Fifth Circuit seems to have concurred in these views. In fact, *Regus* v. *Morrison*, 30 Fed. (2d) 685, 22 Fed. (2d) 804, when read in connection with the record in that case, clearly indicates the contrary. The order in the instant case does not offend against the holding of the First Circuit in the Goldman case, for here *merchandise* was concealed and *merchandise* was ordered turned over. And, it is interesting to observe that one of the three judges of the First Circuit even dissented from the Goldman decree on the ground that under the decision of this Court in the Prela case, cited *infra*, the order was good.

On the other hand, Circuit Courts of Appeals in the Second, Third and Fourth Circuits have sustained turnover orders very similar to the one in the case at bar as being sufficiently definite.

THE SECOND CIRCUIT.

While we do not have available verbatim the turnover order *In re Levy & Co.*, 142 Fed. 442, 73 C. C. A. 558, from the Second Circuit, it is apparent from the opinion that it could have been no more specific than the one here involved and that it was arrived at by similar proof except that it was not supported by the background of fraud which is found in the instant case. Later, that court decided *In re* Prela which is discussed hereafter under the holdings of the Supreme Court. See also In re Magen 10 Fed(2) 91, from this circuit, discussed in next paragraph, through error.

THE THIRD CIRCUIT.

In the Third Circuit authority for our position is ample. In *Epstein* v. *Steinfeld*, 210 Fed. 286, 127 C. C. A. 54, the order of the referee seems to have commanded the turnover of:

> "3,061 dozen waists and 8,031-7/8 yards and 10,750-5/12 dozen trimmings *of a value of $28,686.34* forthwith, which property the said bankrupt had in his possession at the time of the filing of the petition against him, and which he withheld from the trustee *and still withholds.*"
>
> (See 206 Fed. Text 568 and 570, and 210 Fed. 236, Text 236.)

The district judge struck the italicized words and the Circuit Court of Appeals affirmed his decision.

In *Hirsch* v. *Schilling*, 28 Fed. (2d) 171, the referee's order, taken from page 45 of the printed transcript in the Circuit Court of Appeals, recites the trustee's petition for:

> "property belonging to this estate of the value of $20,000 and upwards * * * or the reasonable money equivalent for said property";

and the referee's report, taken from pages 42 to 44 of said transcript, shows that the method of proof was identical with that in the case at bar; and the order was, that Hirsch pay over

> "the sum of $10,000 for merchandise and property belonging to this estate and found to be in his possession and under his control and concealed by him" (T. p. 46, Opinion, p. 172).

This was affirmed.

In *In re H. Magen Co.*, 10 Fed. (2d) 91, the referee found the respondent had:

> "assets belonging to this estate in bankruptcy herein, consisting of silk and cotton yarn of the value of $32,779.74" (Text 95).

and ordered delivery by the following description:

> "the said silk and cotton yarn of the value of $32,779.74, or, at the option of the respondent, in lieu of the said merchandise, to pay to the said trustee, within the said period of five days, the sum of $32,779.74 in cash" (Text 92).

In the second headnote, the holding of the Circuit Court of Appeals is thus digested:

> "Turnover order may properly issue, though no definite property or money is found in bankrupt's possession, where proved facts warrant inference that there is a withholding or concealment of assets unaccounted for."

This case is from the second C.C.A.

This language perhaps goes a little further than the opinion, but, we submit, the opinion goes far enough to sustain the case at bar.

In *Sheinman* v. *Chalmers*, 33 Fed. (2d) 902, the decree which was affirmed described the property to be turned over as follows:

> "cash to the amount of $32,751.17, and goods and merchandise of the kind usually carried by said bankrupt in cotton and woolen business formerly conducted by him, consisting of blankets, cloths, cretonnes, chiffons, crash, curtains, flannels, ginghams, linens, lineens, muslins, *etc., etc.,* and *similar merchandise* of the total value of $34,447.64, money and property which the said bankrupt had and which formed part of his bankrupt estate at the time the petition in bankruptcy herein was filed against him and which he has failed to turn over to his said Trustee" (Transcript in C. C. A. p. 56) (italics supplied by us).

The affirmance of that order by the Circuit Court of Appeals was expressly made:

> "keeping in view the principles of *Oriel* v. *Russell, supra*" (Text 904).

In *In re Cohan*, 41 Fed. (2d) 632 the referee's order directed the delivery of:

> "goods or merchandise consisting of shoes, overshoes, boots, socks, hose and other footwear, to the value of $52,397.61, or the proceeds thereof, which came into his possession between January 1, 1928, and January 5, 1929, and which he had in his possession or under his control January 5, 1929—the date he filed his petition—and which he concealed or otherwise failed to turn over to his trustee" (Opinion 632, or C. C. A. Transcript p. 317).

The order of the district judge was simply for:

> "said concealed assets, consisting of goods and merchandise to the amount of $52,397.61, or the proceeds thereof" (C. C. A. Transcript p. 318).

Contrary to the apparent belief of the writer of the opinion in the Miller & Harbaugh case, *supra*, the question of the form of the order was distinctly presented on that appeal by an assignment of error reading as follows:

> "7. The order entered against the bankrupt in this case is vague and indefinite as to the kind and character of merchandise required to be turned over and there is no sufficient finding of fact to support it."
>
> (Transcript C. C. A. p. 321.)

But, this order was held valid.

THE FOURTH CIRCUIT.

The case of *Kirsner* v. *Taliaferro*, 202 Fed. 51, 120 C. C. A. 305, clearly brings the Fourth Circuit to the support of the order in the instant case. There, according to the opinion (p. 53) the order required the delivery of:

> "goods and merchandise of the character and class heretofore carried by him, being dry goods, notions, and ladies' ready-made clothing to the value of at least $4,166.54 wholesale price."

The Court dismissed the contention that this order was too indefinite a description in this language:

> "The bankrupt says that there was error because the court below undertook to decree against him for certain goods without specifying or describing in any manner the same so as to enable him to know how or in what manner to

> comply with said order. The goods were described as such as he had carried in his stores, namely, dry goods, notions, and ladies' ready-made wear of the cost or wholesale price of $4,166.54. This was sufficiently definite" (Text 57).

Incidentally, this case was the one which the Ninth Circuit thought went too far, but was one of those which this Court in its opinion *In re Prela, supra,* cited as "indicating a hesitation and great reluctance" to enforce compliance with a turnover order (278 U. S. Text 365).

II.

Conflict With Decision of This Court.

It is respectfully submitted that the Circuit Court of Appeals' decision herein misapplies and conflicts with the holding of this Court in *Prela* v. *Hubshman,* which is reported in 278 U. S. 358, 73 L. Ed. 419. In that case the order, as revealed by the record filed in this Court, commanded the turnover of certain cash and merchandise, the merchandise being described as follows:

> "Goods, wares and merchandise, consisting of 6,099¼ yards of silk, or the sum of $8,387.20, as the cash value thereof."
>
> (See Record in this Court, 1928 Term, Case No. 91, pp. 6 and 10.)

Yet, this Court did not hold that order void (for, surely failure to obey a void order could not be contempt), but held that such order was conclusively valid on the collateral attack attempted in the subsequent proceedings.

Furthermore, this Court in that opinion speaking through the Chief Justice cites some eight model cases as seeming "to lay down more nearly the correct view" (Opinion, p. 364). Of these cases, four are from the Third Circuit, including *Epstein* v. *Steinfeld, supra,* and one is from the Second Circuit, each of which circuits, as we have seen, unquestionably uphold the petitioner's position in the instant case. None are included from the Fifth or Ninth Circuits.

The only reference in the opinion of this Court in the Prela case to the views of the Fifth Circuit is the suggestion of this Court that its decision indicates "a hesitation and great reluctance to issue orders of commitment where there be any reasonable doubt of the ability of the bankrupt to comply" (p. 365) as exemplified by the case of *Stuart* v. *Reynolds,* 204 Fed. 709, 123 C. C. A. 13, which case but reiterated the view which that Court had expressed in *Samel* v. *Dodd,* 148 Fed. 68, 73 C. C. A. 254, and perhaps was not quite so "reluctant" even as was the Samel vs. Dodd decision. Yet, it is largely its decision in the Samel vs. Dodd case on which the lower court relies in the case at bar.

In the Prela case the views of the Fourth Circuit, as expressed in *Kirsner* v. *Taliaferro, supra,* were likewise characterized as too "hesitant" and "reluctant," and, yet, the Fourth Circuit held in that case, as we have seen, that it was not so reluctant as to hold an order like one in the case at bar void for indefiniteness.

Incidentally, the opinion in *Prela* v. *Hubshman*; and *Oriel* v. *Russell*, *supra*, concludes with an extended quotation from the language of Justice McPherson of *In re Epstein*, 206 Fed. 568, on behalf of vigorous enforcement against fraudulent bankrupts, this being the same case as *Epstein* v. *Steinfeld*, 210 Fed. 236, 127 C. C. A. 54, *supra*.

It is submitted, therefore, that the Ninth Circuit decision in the Miller & Harbaugh case, *supra*, on which the lower court herein relied, while it attempted to distinguish many lower court holdings, completely overlooked in its discussion of the opinion of this Court in 278 U. S. 358 the fact that *In re* Oriel was not the only case therein involved, and failed to note that the facts in Prela vs. Hubshman, to which the language of this Court is equally applicable, betrayed a conflict with their construction of this Court's holding, and that the Circuit Court of Appeals of the Fifth Circuit in the case at bar has probably fallen into the same error. Rather do we think that the opinion of District Judge Patterson in *In re Ginsburg*, (D. C. N. Y. 50 Fed. (2d) 240), where the referee's order commanded the delivery of:

> "underwear, gloves, and dry goods of the value of $13,424.86"

properly interpreted the opinion of this Court in the Oriel and Prela cases. The proof in the Ginsberg case paralleled that in the case at bar except that there was no evidence of fraud to fortify it such as we have here. Said the judge in that case:

"I do not regard the Oriel case as discountenancing proof of this kind or as requiring from now on the testimony of unimpeachable eyewitnesses who saw the bankrupt removing his goods by stealth. The proof furnished by the trustee was of the same character as that heretofore given in many cases in this circuit, where turnover orders were issued, and the general rule here has for many years been the same as that recently laid down by the Supreme Court in the Oriel case —proof of a clear and convincing character, a mean between the extremes of mere preponderance and proof beyond reasonable doubt. I think that the referee gave full effect to the Oriel case when he went along with the bankrupt as to every matter in which the latter gave any tangible figures tending to explain the large discrepancy, and this despite the poor opinion which he had formed of the bankrupt's credibility" (Text 241).

III.

An Important Question of Federal Law Which Should Be Settled.

If we are in error in thinking that the Prela case in this Court settled this question contrarily to what the lower court has held in the instant case, we submit that it is of vast importance for referees and trustees to have a definite rule laid down by this Court as to when they can force a defrauding bankrupt to account for the assets which he withholds from his trustee in bankruptcy. There probably was never a time in the history of the Federal Bankruptcy Statute when bankruptcy cases were more numerous than today, and, there probably was never a time when referees were more often confronted with the problem of how to obtain possession of secreted assets of bankrupts.

If it be true, as the lower court in the instant case has in effect held, that the order must be so definite in its description of the goods and property which the embezzling bankrupt has secreted that one could tell from the four corners of the order exactly whether each and every article tendered was one of the articles called for, if it be true that any order to turn over assets of a given cost price and value which have been clearly proven to be withheld by a general description of the class of merchandise of which they consist and as being a part of the merchandise shown to have been charged to the bankrupt by his records and by the proofs of claim is so indefinite that "it describes nothing, it identifies nothing" (R. 59), and is "void" (R. 60), then unscrupulous and dishonest bankrupts will be multiplied and courts of bankruptcy will become mere automatons to enable the fraudulent to reap the benefit from a statute which was enacted to benefit only the oppressed.

We submit that particularly where the shortage is established by records kept by the respondent himself, and by his own testimony on the stand as the referee's opinion shows it was established in the instant case, and, where that conclusion is fortified by proof beyond a doubt that at the very day of bankruptcy he was moving most of the remainder of his assets under cover of nighttime to other hiding places, and where the trail of fraud shows that he was transferring the bankrupt's fixtures and leasehold to himself, and where the merchandise, which the trustee found in out of the way places, has all identification marks defaced and is

inventoried ready to establish other drug stores, and where seven months after bankruptcy certain portions of the very merchandise which the accounting showed was missing turns up in the possession of the defaulter, so that inadvertence or mistake is completely excluded, it is going a long way to say that a court which is authorized to "cause estates of bankrupts to be collected" must stop short in its power until it can name the number, package size, and manufacturer's brand of each drug and toilet preparation which has been withheld before it can order the same to be delivered by the defrauder.

Hence, we respectfully submit that this important question of whether the bankruptcy courts are impotent, except when they can set forth a description as particular as a levy on an execution, should be determined by the final interpreter of federal statutes—the Supreme Court of the United States.

Conclusion.

It is, therefore, respectfully submitted that the instant case is one calling for the exercise by this Court of its supervisory power in order that the error pointed out herein may be corrected; that the law may be properly and accurately defined; that the judgment of the referee and the district judge may be affirmed and that of the Circuit Court of Appeals for the Fifth Circuit reversed; and that to such end that the writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, and, finally reverse it.

All of which is respectfully submitted.

C. EDMUND WORTH,
Counsel for Petitioner.

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In The

Supreme Court of the United States

October Term, 1932.

No. 888

FRANK E. COOPER, As Trustee of Wauchula Central Pharmacy, Inc., a Bankrupt,

Petitioner,

v.

R. F. DASHER,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT OF FACTS.

This case was orally argued before the Circuit Court of Appeals for the Fifth Circuit on the 21st day of February, 1933, by the attorney who brings the petition for certiorari to this court (R. p. 55). The appeal to that court had been pending for a long time. Under the rules that court would have heard and determined the appeal

had the appellant in that cause filed no brief. The appellee was not entitled as a matter of right to a copy of appellant's brief without making an application therefor to the clerk of that court at New Orleans, La. His failure to make his application was perhaps due to the fact that the writer of this brief personally delivered to him at Tampa, Florida, a true, typewritten copy of R. F. Dasher's brief on the 9th day of February, 1933, which was at least twenty-four hours sooner than he could have received a copy of the brief after application through the ordinary course of the mails had the appellant filed his brief in the Circuit Court of Appeals on the date which the petitioner herein contends it should have been filed. We contend that this is a trivial matter to submit to this court. If the rules and practice of the Circuit Court of Appeals are unfair, the petitioner herein has not chosen the proper method to correct them.

Most of the stock of goods of the estate of the bankrupt, Wauchula Central Pharmacy, Inc., was purchased jointly at private sale from the petitioner herein at 60 per cent of their own appraisal by two creditor corporations whose employees jointly appraised the goods. While he is in contempt of court the respondent can bring no action to compel the return of these goods to the bankruptcy court. This presumable fraud having been discovered after the turnover order, we submit that under the ruling of this court in the *Perla case, infra,* no testimony is admissible before the District Court, or elsewhere, to establish the fraud or discrepancy until the turnover order is vacated.

The referee in bankruptcy in the instant case failed or neglected to appoint three disinterested appraisers to appraise any of the property of the bankrupt estate until October 19, 1932, more than ten months after the turnover

order and more than eighteen months after practically all of the property of the bankrupt estate had been disposed of. The official appraisers valued the remaining goods at $30.00 without attempting to appraise the other merchandise of the bankrupt which the referee estimated should have been $49,495.81 (R. p. 25).

The contention of the respondent in contempt is that the deficiency of $19,157.66 was caused by the failure of the trustee in bankruptcy (previously receiver) to have the property legally appraised by three disinterested appraisers in accordance with Section 70-b of the Bankruptcy Act, and the sale of the goods under circumstances similar to those frowned upon in the case of *In re Frazin & Oppenheim, 181 Fed. 307 (C. C. A. 2nd Cir.)*.

ARGUMENT.

I.

After reading the decisions cited by the petitioner, we are inclined to believe that the purported conflict between the various Circuit Courts of Appeals complained of by the petitioner is more anticipated and imaginary than real. A careful reading of the turnover order of the referee in bankruptcy (R. pp. 24-28) and the opinion of the Circuit Court of Appeals for the Fifth Circuit in the instant case clearly indicates that with reference to the "unidentified and unidentifiable merchandise 'of a cost value of $19,157.66,' " the turnover order of the referee in bankruptcy was reversed because:

(1) The referee did not first determine that the respondent had the goods in his possession at the time of the order or that he was presently able to comply with it.

(2) The property ordered to be turned over was insufficiently described.

The first contention by the petitioner herein that the question presented before this court is "single" is therefore not borne out by the record and needs no argument (R. pp. 56-60).

II.

That portion of the turnover order specifically describing the goods mentioned therein is not questioned before this court because the respondent has since the turnover order found these goods, or practically all of

them, in the actual possession of good and respectable citizens who actually purchased same before the bankruptcy in the present case. His more serious dilemma concerns the undescribed goods.

The petitioner admits that the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in harmony with the decisions of the Ninth Circuit and apparently concedes that it is in harmony with the Circuit Court of Appeals for the First Circuit. The respondent respectfully submits that the petitioner in his brief is mistaken in his statement that the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the controlling decisions of the Second and the Third Circuits on the question of the sufficiency of the description of the goods in the turnover order.

We have read all the cases from the Circuit Courts of Appeals cited in the petitioner's brief from pages 15-21, inclusive. We find that in none of those cases was the question as to the sufficiency of the description of the merchandise involved in the turnover order discussed in the written opinions by the respective Circuit Courts of Appeals, except in the lone case of *Kirsner v. Taliaferro, 202 Fed. 51 (C. C. A. 4th Cir.)*. Under the peculiar circumstances of that case the insufficiency of the description of the merchandise may not have been seriously urged or may not have seriously affected the rights and liberty of the litigants. That court seemed to treat the matter of little or no importance and disposed of the question in one short sentence without reason or precedent. Apparently the main controversies in that case were all foreign to the point raised here. No mention is even made of the sufficiency of the description in the headnotes or syllabus of that case. We, therefore, con-

tend that the case of *Kirsner v. Taliaferro, supra,* is not a *controlling* decision on the question involved herein in any circuit.

In the lonesome case of *In re Cohan, 41 Fed. (2) 632 (C. C. A. 3rd Cir.),* we note that petitioner has resurrected a copy of the transcript in that case and actually found that there was an assignment of error in that case on the insufficiency of the description of the property. However, that case was decided on entirely different grounds, and that particular assignment was apparently waived or abandoned because the opinion of the court does not even mention it.

We have also studied the written opinion of this court in the case of *Perla v. Hubshman, 278 U. S. 358, 73 L. Ed. 419,* and the written opinion of the Circuit Court of Appeals for the Second Circuit in that case, *23 Fed. (2) 413.* Evidently the question as to the sufficiency of the description of the property involved in the turnover order was never raised in the Circuit Court of Appeals or in this court in the *Perla case* because no mention of same is found in either of the opinions. It is therefore a matter of conjecture as to what decision the Second and Third Circuit Courts of Appeals would have made concerning the single matter sought to be reviewed here by the petitioner had such a question been fairly presented and urged before those courts.

What we have just stated is supported by the Circuit Court of Appeals for the Ninth Circuit in the recent case of *In re Miller & Harbaugh, 54 Fed. (2) 612 at page 616,* wherein that court said:

> "The only case we have found, none is cited, in which it is directly held in the face of an objection raising the question that the description of property

such as contained in the order under consideration in the case at bar was sufficiently definite and certain to sustain a commitment for contempt, is the case of *Kirsner v. Taliaferro, supra.*"

CONCLUSION.

We contend that any other decision than that rendered by the Circuit Court of Appeals for the Fifth Circuit in the instant case would facilitate frauds and oppressions on the part of persons trusted to administer bankrupt estates. Any other decision would be tantamount to imprisonment for failure to satisfy an order in the nature of a money judgment. Any other decision would resurrect from the dark ages that infamous and indefensible trial by ordeal to determine whether the victim could pay $19,157.66, not contemplated by the Bankruptcy Laws or the Constitution of the United States. Unless the property is described the turnover order of a referee in bankruptcy is not clothed with as much respectability as a proceeding to jail a defendant for debt upon a common law judgment where the creditor plaintiff secures a judgment after refusing to itemize or notify the debtor as to the account sued upon.

Of course defendants may waive proof and often confess judgments or allow judgments by pro confesso or default and waive their rights by refusing to defend the suit. That is not true in the instant case where the respondent is only temporarily released after serving 104 days in the common jails under the turnover order, while none of the alleged missing goods can, or have been, found. He can ill afford to abandon or waive his assigned errors on the part of the referee in bankruptcy in the instant case.

It is bad enough that the opinion or decision of only one man may take away the liberty and reputation of another. But a legal system that would permit or impose upon a referee or judge the responsibility of taking the property, reputation and liberty of another citizen on guesswork, estimation and speculation is inimical to our plan of Government. If the referee in the instant case will describe the goods in his order whether they be toilet articles or sandwiches, the respondent may be enabled to trace them to *bona fide* purchasers before (or after) bankruptcy as he has since been able to do with regards to the small list of specifically described goods.

The Circuit Court of Appeals for the Fifth Circuit correctly held that under the turnover order in the instant case, *"the respondent himself could not safely undertake to comply with it, nor could any officer of the court safely compel him."*

We, therefore, contend that a careful reading of the opinions of the Circuit Courts of Appeals cited by counsel for the petitioner for certiorari in the instant case will disclose that he is presenting a hypothetical conflict and moot question to this court. There is no real conflict between the decisions of the Circuit Courts of Appeals on the questions involved in the instant case. This court has held on numerous occasions that it would not lend its aid to the decision of moot and anticipated questions. *United States v. Hamburg-Amerikanische Company, 239 U. S. 466, 60 L. Ed. 387 at page 391.*

Respectfully submitted,

BURTON G. HENSON,
W. K. ZEWADSKI, JR.,
Tampa, Florida,
Counsel for R. F. Dasher,
Respondent.

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In The

Supreme Court of the United States

October Term, 1933.

No. 30.

FRANK E. COOPER, as Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt,
Petitioner,

v.

R. F. DASHER,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court:

Comes now R. F. Dasher, respondent in contempt, in the above entitled cause, he being now a prisoner in the County Jail of Orange County, Florida, after serving an aggregate of 126 days as a prisoner in jail under two separate commitments for contempt issued by the senior United States District Judge in and for the Southern

District of Florida for failure to comply with the turnover order of H. P. Baya, Referee in Bankruptcy, dated the 10th day of December, 1931, which said order was affirmed by the opinion of this Honorable Court on November 6, 1933; still persisting in his innocence and within twenty-five days after entry of said judgment by this Court, petitions for a rehearing in said cause, and for other special relief as hereinafter set forth.

I.

Errors Of Fact.

Your Petitioner respectfully represents as a matter of truth as well as a matter of record in the above cause that the first postulate or sentence in the written opinion of this Court in the above cause should be corrected before said opinion becomes final in the sense that it can never be corrected.

(a) The statement of fact in said first sentence complained of, states:

> "During the night immediately following the filing of a bankruptcy petition the president of a bankrupt corporation withdrew the *bulk* of the merchandise by stealth and lodged it in hiding places known only to himself." (Italics ours.)

Whereas, an appeal to page 14 of the printed record in this cause shows that only the "merchandise" mentioned in subparagraphs 7th and 8th of the turnover order had been moved into these places during the nighttime and early morning of the night immediately following the Petition in Bankruptcy herein, and the record is silent as to whether or not that portion was the "bulk" or a minor portion.

This is the only part of the record before this Court, and no testimony is here, wherefrom we believe such an inference that the bulk or major portion of the merchandise was so moved at the time mentioned. Unless corrected future readers will read from the published opinion unwarranted addition to the record.

Neither does the record show that this respondent *personally* removed the "bulk, or any portion, of the merchandise during the night immediately following the filing of a bankruptcy petition." (Italics ours.)

In truth and in fact more than eighty (80%) per cent of the merchandise both in value and numerical pieces, found and turned over to the Receiver in Bankruptcy on the very first day of his appointment, to-wit: February 26, 1931, two days after the filing of the original petition in bankruptcy, was found in the places designated by the Referee in Bankruptcy in subparagraphs 4th and 5th of the said turnover order as the same appears on page 14 of the printed record before this Court. We regret that we cannot go outside the record to say that the Receiver has found no goods except those pointed out to him by respondent.

Your respondent further respectfully contends that such a statement in the published reports against him is quite unfair in the face of the record both to himself and to his posterity. Be this a postulate or premise, major or minor, we respectfully advise that it is in error and a decision of this Court should not be based and ultimately rest upon it.

(b) There appears as a further postulate or premise in said written opinion the following sentence with reference to merchandise turned over to the Receiver by the respondent, "Much of this would have been lost to the

creditors if it had not been *'unearthed'* from the hiding places where it had been concealed by the respondent." Considering the turnover order in its entirety as an infallible verdict and every reasonable inference therefrom *non constat* that the said Receiver *"unearthed"* any merchandise whatsoever. Your respondent therefore submits that the word "found" should not be interpreted "unearthed" in a war of words to become a lasting and permanent public record against this respondent in the published reports of the highest Court of this Country.

Your respondent, therefore, respectfully submits that in all fairness and dignity and respect for this Court that the printed record herein warrants no such a prejudicial statement against this respondent as conveyed by the idiomatic word "unearthed."

(c) Your respondent further shows that the following equivocal phrase, "Nor is the respondent yet in jail," is an unnecessary inference from a silent record. In fact at the time of the rendition of the opinion of this Court he had served 104 days as a common prisoner in jail under the first order of commitment which was only temporarily suspended on the day that the Circuit Court of Appeals allowed his appeal, to-wit: December 20, 1932, and this phrase should be eliminated.

II.

The Four Months Bankruptcy Limitation.

Is the calculation period limited by the Bankruptcy Act? What is reasonable and what is *ad infinitum* ought to be solved in this case.

Section 3 (a) of the Bankruptcy Act defines as one of the acts of bankruptcy the removing and concealing of property with intent to hinder and defraud creditors. In substance the respondent, Dasher, is so charged. Section 3 (b) specifically takes away the jurisdiction of the bankruptcy court to harass and compel poor debtors to become memory freaks or to answer in a summary tribunal on account of such acts happening more than four (4) months before the filing of the petition in bankruptcy.

Hovland v. Farmers State Bank, 10 Fed. (2) 478 (C. C. A. 8th Cir.), is one of the line of many cases under Section 3 (a) 2 in which the respondent, Hovland, was charged with transferring and secreting his property to hinder and defraud all his creditors, except one. The same four (4) months' limitation also extends to Section 3 (a) 1, and in the cases of *In re Magen Company, 10 Fed. (2) 91*, and *In re Chavkin, 249 Fed. 342*, cited by this court in the instant case, the Circuit Court of Appeals inferentially or *sub silentio* limited the fishing expedition or method of computation to four months prior to the beginning of bankruptcy, although this point of four months has apparently never been squarely raised before any appellate court until the present case. In the cited case of *In re Stavrahn, 174 Fed. 330*, there appears to have been no such process of computation for in that

case $5000.00 was actually traced to the bankrupt nearly two years after bankruptcy but before discharge.

Our position is that this case is before this court on all the issues raised before the Circuit Court of Appeals for the Fifth Circuit and it ought to be decided now whether or not a Referee may adopt a method of computation extending more than four (4) months prior to the beginning of bankruptcy and thereby indirectly compel what the apparent intention and Act of Congress forbids, notwithstanding Section 14 (b) 4 which cannot apply to a corporation or their officers. The same general prohibition or limitation of four (4) months is also repeatedly found throughout the Bankruptcy Act at Secs. 60-a, 60-b, 67-c, 67-e, 67-f and 68-b.

We, therefore, petition this court to review this cause and determine this issue which was raised in the Circuit Court of Appeals although that court reversed the most complained of portion of the turnover order on other grounds and this court did not actually pass on this vital question except perhaps *sub silentio*. The Bankruptcy Act itself limits the recovery in a summary proceeding of goods conveyed or secreted previous to four months prior to bankruptcy. *Hovland v. Farmers State Bank, supra.* We submit that if this opinion is not at least modified hereafter any mathematician, efficiency experts, accountants and other estimators, disregarding months and even years of time and lack of intimate knowledge of the business can with this unsafe and hazardous method or process with unlimited perspection *ad infinitum* conclude that every debtor, who has not had a fire, whose assets do not exceed his liabilities is guilty of misappropriations or concealment of assets.

Fortified by the unmodified decision reached by this court as it now stands in the instant case, a Referee in

Bankruptcy may with ease and impunity summarily fill the jails of this country with poor debtors with little or no possibility of an appeal under the present law from his findings of fact. The reason is that under Section 24-b of the Bankruptcy Act there is no appeal on the evidence; the citizen debtor is merely limited to an appeal "*to revise in matter of law*" only. Under the Bankruptcy Act no general appeal on the facts and evidence is authorized. Only by General Bankruptcy Order XXVII of the Supreme Court may the evidence be reviewed and in such event "the Referee shall forthwith certify to the District Judge the question presented, *a summary of the evidence* relating thereto, and the finding and order of the Referee thereon."

Surely this Court did not consider the gravity of this situation as it affects the rights and liberty of untold posterity at the hands of an inferior court officer whose office is not unlike that of the Justice of the Peace in that it is not a court of record and is the lowest in dignity in the Federal Judicial System. In fact the referee is in reality an administrative rather than a judicial officer. Secs. 2 and 33 of Bankruptcy Act. We respectfully inquire if this Court was not overly impressed with the calculated and unnecessarily prejudicial statements of the Referee in the inducement to his turnover order and thereby impatient with respondent's protest of innocence? After a cool and fair reading of the turnover order, inflammable as it first appears, is it not safe to say that the "computation method" was the only material evidence upon which the Referee based his finding and order? In the cases cited such methods of computation supplemented or corroborated other positive testimony. But in the instant case it overshadows all.

III.

Administrative Justice Should Not Be In Derogation Of Ancient and Constitutional Rights.

We respectfully submit that no Bill in Chancery would lie for the specific delivery of chattels or land under a description as vague and indefinite as the description of merchandise in the instant case. *Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253.* Many other similar decisions may be found in *58 C. J. Secs. 96 and 106,* with notes. We submit that it is more to the public welfare that justice should be sure, definite and certain, than to permit, facilitate and invite a Justice of the Peace or Referee in Bankruptcy to dispense wildly and recklessly his own formula of justice in terms of undependable inventories, appraisements and calculations which grow less accurate when hidden by time and perplexing symbols and oracles of indefiniteness when clear and plain idiomatic English would suffice. For example, how can an innocent victim who may be caught in the snare of calculations ever extricate himself if he must resort to another tribunal to prove what the Referee intended but did not describe?

We most respectfully submit that to extend a fiction of law and ascribe to a Referee in Bankruptcy a certain infallibility in determining issues of fact in such cases as is this, especially in view of the fact that this office is by its very nature more administrative than judicial, strike at the very foundations of the citizens' liberty. The Referee in actual practice is compelled to come in contact with the Receiver, the Trustee, the detectives (when such are employed) and the Auditors. They are most frequently his appointees and as such necessarily have his confidence and his ear. In this situation it would be

strange indeed, and the Referee would have to partake somewhat of the preternatural, if their views and enthusiasms would not necessarily find reflection in the Referee's perspective when casting aside for the moment his administrative character he dons the judicial robes and sits in judgment of the citizen with a view of determining whether the suspicions and calculations of these officers outweigh the presumptions and sworn testimony of the bankrupt.

The Bankruptcy Law does not punish for failure to keep an accurate double entry system of bookkeeping and yet, when a citizen is ensnared in calculations predicated upon an insufficient set of books, coupled with the usual enthusiasms which an administrative duty invariably engenders in officers whose pay and frequently whose employment depends upon results obtained, shall it be said that in this great republic he has no alternative but to painfully submit to incarceration in the common jail, there to remain until the passage of time shall "supply the previous defect in evidence."

Turnover orders such as this are generally prepared by the solicitor in the heat and prime of victory and are calculated to embarrass the loser in the legal battles. The undersigned counsel came into this case long after the turnover order and after the order confirming same. Firmly believing, as he does, in the innocence of his client, he does not flinch to attack this order on seemingly technicalities, the proper determination of which will establish justice and prevent future wrongs to our citizenry.

In petitioning this Honorable Court to reconsider its yet tentative opinion in the above case we believe from statements appearing on the second page of the written opinion, that this Court gave undue weight to statements

of the Referee as to his view of the evidence, without considering that those statements or findings of fact are from a human being who is not infallible and the law gives no Appellate Court the opportunity to review the sufficiency thereof. Notwithstanding one District Judge may review the Referee's own summary of the testimony if the respondent bankrupt files his petition for review in our jurisdiction within ten days from the Refetee's order. As a matter of practice the Referee is always the personal appointee of the Judge and the presumption of correctness in his finding of facts is freely indulged. But that ought not to be the case when a cause is brought up on appeal under Section 24-b of the Bankruptcy Act.

No such unrestrained power of one Bankruptcy commissioner, sitting alone to punish summarily for contempt is permitted in England. *King v. Faulkner, 2 Mont. & Ayr. Cases in Bankruptcy, 311.* With the doctrine announced in *Perla v. Hubshman* and *Oriell v. Russel, 278 U. S. 358,* in combination with the opinion of this Court as now written such power in the Referee becomes an unchallengable fact as the District Judge merely becomes a quasi automaton *in limini* with no power to listen to any other reason except the order of his Referee and imprison the citizen.

No such unrestrained power should be placed in a single person in America, and if it is so unfortunately placed he should not cause the loss of liberty of the lowest culprit or citizen except upon certainty and definite information which he can repeat in idiomatic vernacular rather than calculation and suspicion as shown on the face of the turnover order about to be confirmed in this case.

Pine forte et dure and trial by ordeal were instituted to substitute for the absence of convincing evidence, posi-

tiveness and certainty. Perhaps third degree methods as frowned upon by this court in the case of *Wan v. United States (266 U. S. 1)* may sometimes be justified, but the establishment of a precedent and rule by this court to punish a citizen by imprisonment for contempt where the very face of the Referee's order admits that the evidence before him was insufficient to designate (1) where the merchandise is located, nor (2) to enable him to describe it so that a surveyor could locate it or an ordinary person, friend or relative of the respondent recognize its similarity when they see it, is, we insist, lacking the dignity of a trial by ordeal. Because in that ancient procedure the accused was in every recorded instance first acquainted with the nature and the particularity of the charges against him.

The Fourth Amendment to the Constitution of the United States provides that the right of the people to be secure in their persons, etc., shall not be violated, and no warrants shall issue *without particularly describing the place* to be searched, *and the things to be seized.* A fortiori an order or rather a verdict and judgment by one man comprising both Court and jury in an order to turn over goods the description of which he knows not whereof he speaks nor whereof they are situate.

The Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused shall have a right to a speedy and public trial by an impartial jury, etc., and to be informed of the nature and cause of the accusation. Civil Contempt is "carried on in the shape of a criminal process for a contempt of the authority of the Court." *IV Blackstone 285. Sub silentio does the constitution not forbid that a contempt order be less definite than a criminal accusation?* Is there a single Court of the English speaking race which would

compel a citizen to go to criminal trial on such an indefinite charge as contained in the turnover [illegible] of the Referee herein, in the face of a continuous, persistent objection? Indeed such a criminal punishment indirectly does what the Sixth Amendment forbids. It is the same miserable result though accomplished by a slightly different procedure.

Magnified evidentiary value, suspicion and inference is aroused in the mind of the Referee by legal acts of the respondent, such as 8 barrels of fountain syrup stored in a building 3.7 miles from his place of business in a country town. Apparently these are the disproportionate and suspicious circumstances which complete a deciding factor in aiding the Referee to reach his conclusion that the Referee did not find all of the merchandise.

The saving of warehouse rental, the failure to advise the public of his merchandise storage places, or to keep his merchandise in a public place in the heart of town seems so consistent with guilt and inconsistent with innocence that the Referee was impelled to find that a large amount of other nondescript goods, some kind, somewhere and somehow, were in hiding at the time of bankruptcy. In all fairness we submit, is that evidence of other undescribed goods unfound? Is it even safe corroboration on the ultimate fact to be solved? We think not.

VI.

The Law Should Not Presume That a Citizen Can Perform the Impossible.

The Referee did not find as a fact that the undescribed or nondescript merchandise was actually in the possession of the respondent at the time of the turnover order. We contend such a finding was necessary for its validity. (See pages 17, 18 and 20 of Record.) For aught appearing in the order it may be assumed that it directs the respondent to do the impossible which is abhorrent to the law. See *Goldstein v. Johnson, 3 Fed. (2) 228 (C. C. A. 6th Cir.); Henkin v. Fousek, 246 Fed. 285, 290;* also *Collier on Bankruptcy (12th Ed.), page 687.*

This Court in its opinion did not seem to consider the question of present possession and ability to comply with the turnover order at the time it was entered. We think it material because in the *Oriell* and *Prela cases, supra,* this Court held that the respondent can again only offer proof of the disposition of the goods *subsequent to the date of the turnover order.* The legalistic gap, or interim of 289 days from bankruptcy to the turnover in the instant case therefore still remains a forbidden anomalous obscurity insofar as the record discloses if the turnover is allowed to stand unmodified.

The reason for opening up this legalistic unexplored abyss now apparently denied by the *Oriell* and *Perla cases* in combination with the opinion of this Court as now written, becomes a thousand times more cogent since the District Judge has denied summarily (on the authority we believe of the *Oriell and Perla cases)* the petition of the respondent to show facts ascertained by him

subsequent to the turnover order to the effect *that subsequent to the time of bankruptcy but prior to the turnover order, the merchandise was never appraised by anyone appointed by the Court in accordance with Section 70-b of the Bankruptcy Act.*

In plain idiomatic English the main defense of this respondent lately discovered is that the Receiver in Bankruptcy arranged with two creditor corporations to have their regular officers and employees to jointly inventory and appraise this property on the Sunday following the receivership; that these unofficial appraisers, competent as they may be, owed no duty to the creditors, the respondent or the Court, and so fixed their appraisal at about two-thirds (2/3) of the real and true value so that they could purchase the goods at a bargain price at private sale without notice to the creditors, which they did. That this was in truth and in fact the inventory which ultimately showed a shortage in the supposed hands of the respondent and defrauded the other creditors. If the opinion of this court is modified so that this true fraud which occurred during the 289-day period can be brought to light we believe ultimate justice will be served. But we insist that the turnover order if confirmed *as is* cannot be collaterally attacked, and there is no evidence or record before this Court which would warrant this Court to presume such a shocking fraud. Unless the opinion of this Court is modified it lends aid, comfort and immunity to the very thing it was intended to quell.

How can respondent or his counsel know that their appraisal was of a complete inventory. They were not officers *of the Court.* Their self-interest conflicted with a complete inventory.

The Referee refused or failed to inquire as to that eventful period. The District Judge is forbidden to inquire or permit the respondent to disclose the happenings of that interim. This alone should reverse the turnover order as an instrument of unfairness, and containing its own refutation.

V.

Whatever Is Judicially Or Otherwise Known Can Be Described.

We take the position that even if the respondent is guilty of all that the Referee claims, or more, he is still nevertheless entitled to be tried under the regular and orderly processes of our judicial system and be informed of the charges and judgment against him in clear and idiomatic language that others may understand.

This Court in its opinion as now written refers to *evidence* and quotes from the case of *Kirby v. Talmage, 160 U. S. 379, 383,* and then states that the validity of the Referee's turnover order "is to be subjected to a kindred test." Apparently the writer of the present opinion in stating the evidence lost sight of the fact that the respondent's only remedy in this cause was a sort of limited appeal under Section 24-b of the Bankruptcy Act where no evidence can be reviewed. The above quoted case, if we read it correctly, came before this Court on the proposition whether or not land occupied jointly by a husband and wife was notice of the wife's unrecorded title to a purchaser from a third person holding a record title. *Kirby v. Talmage, supra,* was submitted to this Court on an answer in equity by Kirby which he relied upon and the Court was bound

to consider it as his sole evidence. The answer to the petition for the turnover order filed by the respondent, Dasher, surely does not receive a kindred test in the present case.

VI.

Uncertainty Is Slavery.

Conceding for the sake of argument that the certainty of a description is a nonessential and although the respondent is most certain to later call the District Court in to supply the vague and indefinite symbols, does it not seem possible that a Referee might or could render an incorrect verdict? Assuming that he could have erred, by what known method can the innocent respondent, Dasher, ever trace the goods to their present *bona fide* owners or to thieves and prove to the satisfaction of the District Judge, who has no special knowledge of their description, that this or that was what the Referee intended in his order to describe? See *Montesanto Chemical Works v. Jaeger, 31 Fed. (2) 188, aff'd 42 Fed. (2) 1018.*

We submit that from the standpoint of an innocent or even guilty respondent this finding is more inhuman than the approval of a trial or test by ordeal. To be sure it places a great and easily wielded weapon in the hands of a Referee comparable to that allowed no living king or potentate coincident with the deplorable modern trend to break down constitutional defenses and barriers long cherished. "The Future of the Constitution" by James M. Beck, American Bar Assn. Journal, September, 1933, issue.

Orders which are an enigma to counsel, a pun to the Trustee and Referee, an ambiguity to the defendant, a symbolism to the judge, nothing to the Marshal and must depend upon the credulity or the reserve power of a District Judge to interpret at a future date makes Lord Coke's declaration true indeed. This strikes with greater force when the imprisoned citizen is moved to a jail in a distant part of the state where he is more inaccessible to his counsel. But is society better served by sacrificing the defense of human liberty to facilitate the recovery of supposed nondescript property? *"It is a miserable slavery where the law is vague or uncertain."* 4 *Coke's Institutes 245.*

Words may be loosely described as symbols but nevertheless they are units of discourse and the English speaking people have developed a quite accurate vernacular. If the Referee had sufficient evidence before him to warrant the order he could have at least described the property to a degree understandable by the Court and counsel in a vernacular that at least their knowledge and experience of mind could comprehend as a fair starting point in locating and finding the property with their client in jail indefinitely awaiting the mercy or credulity of a Judge who may never see him except on the day of his commitment while carrying out a quasi ministerial obligation to jail him.

VII.

Absolute Certainty Is Not Required But Reasonable Certainty Is Necessary.

In *Dunbar v. United States, U. S. 185, 39 L. Ed. 390,* this Court had before it an indictment charging the defendant with smuggling one limited and specified class of merchandise, to-wit: "prepared opium," etc., where no demurrer or objection was even made to the description until after the verdict. Under those circumstances this Court laid down the rule that we believe has been unjustifiably expanded in this case.

Quoting from *Dunbar v. United States, supra:*

> "It is true some parol testimony might be required to show the *absolute identity* of the smuggled goods, but such proof is often requisite to sustain a plea of once in jeopardy. It is no valid objection to an indictment that the description of the property in respect to which the offense is charged to have been committed is broad enough to include more than one *specific article.*" (Italics ours.)
>
> "* * * The rule is that if the description brings the property in respect to which the offense is charged, clearly within the scope of the statute creating the offense, and at the same time *so identifies it as to enable the defendant to fully prepare his defense,* it is sufficient." (Italics ours.)

WE CONTEND THAT TWO (2) SPECIFIC IDENTIFYING TOKENS IS THE MINIMUM OF LEGAL DESCRIPTION HERETOFORE ASCRIBED TO ANY ARTICLE MEETING WITH JUDICIAL APPROVAL.

QUERY.

Does the turnover order in the instant case measure up to the rule as stated in the *Dunbar case, supra*? Could a defendant charged with murdering a human being somewhere, the name and place being only known to the defendant, fully prepare his defense under such circumstance? Would it really help matters to advise him in December that the person was one among those he had seen sometime between a year ago last May and the following February? Could a defendant charged with possession somewhere of an unnamed animal, such as is kept on farms, the description, time and place being only known to the defendant, fully prepare his defense if his counsel could not ascertain whether it was a dog or a horse?

Other hypothetical cases similar on all fours with the principle that this Court is petitioned not to ultimately adopt seems conclusive that under such a miserable slavish procedure the sacred right of defense of a citizen is whittled away to a negligible quantity indeed.

With the greatest of respect for this Court, even to the point of humility, and being advised that appellate courts seldom revise their first written opinion, but with the zeal of patriotism the writer urges that if the legal defense of citizens is thus substantially erased and the accusations of every magistrate and inferior Court is thus presumed by the Appellate Courts to be infallible and the accused a proven culprit without peradventure of a doubt our judicial system cannot long withstand the bar of public sentiment.

We submit that this Court, while this appeal is still *in limine litis* should review the record in this case, re-

verse and retract or at least revise the opinion as heretofore written so that it may more accurately describe the true situation. We further submit that this Court should in the final analysis sustain the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case.

In closing this petition counsel respectfully suggests that no brief on the merits of this case was ever filed in this Court, save and except the briefs for and against the petition for the writ.

Respectfully submitted this 27th day of November, A. D. 1933.

BURTON G. HENSON,
Counsel for R. F. Dasher,
Respondent.

CERTIFICATE OF COUNSEL.

I, BURTON G. HENSON, counsel for R. F. Dasher, do hereby certify that this petition for rehearing is presented in good faith and not for delay.

BURTON G. HENSON.

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In The

Supreme Court of the United States

October Term, 1933.

No. 30.

FRANK E. COOPER, as Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt,
Petitioner,

v.

R. F. DASHER,
Respondent.

BRIEF OF R. F. DASHER IN SUPPORT OF PETITION FOR HABEAS CORPUS AND CERTIORARI *IN FORMA PAUPERIS.*

STATEMENT OF CASE.

The respondent, R. F. Dasher, turned over a large quantity of merchandise to the Referee claiming that they comprised all the goods belonging to the bankrupt corporation of which he was president. He claims that if the goods turned over had been appraised by appointees of the court the appraisal would have conclusively shown that he turned over all the goods that his book accounts indicated belonged to the estate. He com-

plains that all the goods of the bankrupt were inventoried and appraised at a low estimate by the employees of two creditor corporations who intentionally appraised them at a low figure for the purpose of purchasing them at a bargain price. That such was the appraisal that the Referee wrongfully relied upon to convict him of a shortgage rather than a legal appraisal by disinterested appraisers appointed by the court, when in truth and in fact there was no shortage. He complains further that the goods were all illegally sold and disposed of by the Trustee before the filing of the petition for the turnover order so that neither he nor anyone else could question the amount of goods received by the Trustee.

He claims that is the only reason for the purported shortage found by the Referee. He claims that the purported missing goods could not be described by the Referee in his order because in fact there were no missing goods; the discrepancy arising entirely from the unfair and illegal appraisal, made by parties who had not been appointed by the court, who were not under oath to make a fair appraisal, and who later bought practically all the goods at private sale from the Trustee at sixty (60%) per cent of their own appraisal.

He sets forth in his petition that he did not suspect or have notice of such irregular transactions on the part of the officials of the Bankruptcy Court until after his commitment. He, therefore, on December 1st, 1933, presented this matter for the first time before the District Court and that court refused to take cognizance of the matter. He, therefore, brings the same complaint and defense for the first time to this court on a direct proceeding.

I.

Appeal Still Pending.

The appeal of R. F. Dasher from a turn-over order issued by a Referee in Bankruptcy is the first direct appeal under Section 24-b of the Bankruptcy Act from such an order to reach this court. That appeal is still pending before this court on a petition for rehearing now filed.

Jurisdiction and procedure in connection with turn-over orders issued by inferior courts or tribunals is not statutorily fixed by law and the office of referee being somewhat in the nature of an administrative office rather than a court, we think in fairness to Mr. Dasher and to others who are likely to be placed in his predicament if this court does not ultimately sustain the decision of the Circuit Court of Appeals in the instant case, that some judicial check be made of the procedure adopted whereby the findings and conclusions of this Referee originated, not shown on the previous record before the Court of Appeals.

On other occasions this court has permitted the appellant to change and correct the record after the appeal reached this court. See, *Kennedy et al. v. Bank of the State of Georgia, 8 How. 587, at page 611; 12 L. Ed. 1209, 1219.* The respondent, Dasher, did not bring the appeal to this court and the record here is the one that the Trustee in Bankruptcy chose.

II.

Petition For Habeas Corpus and Certiorari Is a Form Of Appeal.

This petition directly to this court is not only fortified on account of the appeal now pending, but has authority as an original proceeding in the cases of *Ex parte, Buford, 3 Cranch. 448; 2 L. Ed. at page 496,* and *Ex parte, Commonwealth of Virginia, 100 U. S. 339, 25 L. Ed. 676.* We quote from the latter case as follows:

> "But the appellate power of this court is broader than its original and, generally, that is in most cases, it may be said that the issue of a writ of habeas corpus by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. Without going at large into a discussion of its extent, it is sufficient for the present to notice the fact that the exercise of the appellate power is not limited by the Constitution to any particular form or mode. It is not alone by appeal or writ of error that it may be invoked * * *.
>
> "In the latter of these cases it was said by Chief Justice Chase, in delivering the opinion of this court: 'We regard as established, upon principle and authority, that the appellate jurisdiction by habeas corpus extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress' * * *.
>
> "We have then, an application to our appellate power over the action of a District Court, in a case where it is alleged that court has acted outside its jurisdiction * * *.
>
> "The bench warrant was an order of the court, and the validity of the bench warrant is the matter in question * * *.
>
> "And in *Ex parte Lange, 18 Wall. 163,* it was ruled, after an examination of authorities, that when a prisoner shows that he is held under a judgment

of a Federal court, given without authority of law, this court, by writs of habeas corpus and certiorari, will look into the record, so far as to ascertain whether that is a fact, and if it is found to be so, will discharge him."

III.

Complaint.

The petition here of R. F. Dasher is in substance that he turned over a great quantity of goods which consisted of all the merchandise of the bankrupt to the Receiver and Trustee in Bankruptcy on the date of his appointment. The Referee in Bankruptcy on the face of his turn-over order described the goods turned over "was of a value of $29,171.04." (See page 17 of Record here on appeal.)

The respondent, Dasher, complains that these goods described by the Referee were actually sold and disposed of at private sale by the Trustee and the sale confirmed by the Referee without ten (10) days' written notice to creditors as required by law and without having the goods admittedly turned over appraised by officers appointed by the court in accordance with Section 70-b of the Bankruptcy Act, long before the petition for the turn-over order was filed in the Referee's office.

Under those circumstances the dilemma in which Mr. Dasher was placed is obvious to this court. The only defense to the petition for the turn-over order was a legal inventory and appraisal as required by law, or to turn to the goods delivered and show the Bankruptcy Court that they comprised all the goods that accounting methods indicated should be in possession of the bank-

rupt corporation at the time of bankruptcy. But the goods had not been legally appraised and in addition they had been disposed of by the Trustee and Referee long before the respondent had notice that he was going to be compelled to prove that those goods turned over comprised all the goods. Mr. Dasher's only defense then had vanished by the hands of his accusers.

Indeed it is inconceivable that any procedure could be more cruel or unfair, even dishonest, toward the respondent. Using a classical expression "there is no judgment in their goings; they have made them crooked paths; whosoever goeth therein shall not know peace." *Isaiah 59:8.*

IV.

Was Appraisal Necessary Prerequisite To Adjudication That There Was a Shortage Of Goods?

The district judge has held, we believe in error, that this lack of appraisal by the Bankruptcy Court is a matter *in pais* attacking the turn-over order. In other words that court *sub silentio* says that it is all too bad for Mr. Dasher that the court first failed in its duty to obey the Bankruptcy Law, but that is Mr. Dasher's "hard luck." We take the stand that this failure to appraise the goods coupled with the private sale and disposal of the goods actually turned over, under the circumstances of this case, strikes at the jurisdiction of a referee to entertain such a turn-over proceeding.

No one can seriously contend that a referee in bankruptcy is a court of general jurisdiction even in bankruptcy matters. The administrative office of referee in

bankruptcy is not a court of record for none of its orders and decrees are enrolled, nor does it have a seal. It is a subsidiary of an inferior court and a very limited tribunal. Consequently there can be no legalistic presumptions concerning its jurisdiction applicable to courts of general jurisdiction.

> "But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an official wrong." *Broom v. Douglas, 175 Ala. 268; 57 So. 860; 44 L. R. A. (N. S.) 164, page 176; Ann. Cas. 1914-C 1155.*

No better illustration of the point involved can be stated than that made by this court in the case of *Noble v. Union River Logging R. Company, 147 U. S. 164; 37 L. Ed. 123, at page 126.* Quoting from said case:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action; the seizure and possession of the *res* within the bailiwick in a proceeding *in rem*, a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged. So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, or condemns as lawful prize a vessel that was never captured; or a court martial proceeds and sentences a person not in the military or naval service; or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the

action of the court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

There is, however, another class of facts which are termed quasi-jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally; the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy; the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate; the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors; and others of a kindred nature, where the want of jurisdiction does not go to the subject matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are (citations omitted)."

This court cited many other cases where a class of facts are necessary to be alleged and proved in order to set the machinery of the law in motion.

It may be erroneously insisted that the goods ordered turned over are not the same goods turned over and it makes no difference whether those goods were ever appraised or disposed of before the filing of the petition for the turn-over order.

That fallacy does not take into consideration that the undescribed goods ordered turned over are merely the difference or shortage between goods which the Referee ascertained from accounting methods should have been on hand and those which he said were turned over. Common sense as well as the face of the turn-over order itself is conclusive that this was the procedure adopted. Mathematically their reason is faulty for the Referee found a minuend of $49,495.81 by the book accounts, the subtrahend of $29,171.04 is alleged to have been arrived at by unauthorized means, therefore, the remainder of $19,167.66 was adjudicated without authority. The logic of the opposition before the District Judge presupposes a different state of facts, where no merchandise was turned over or found, and inquires whether under those circumstances appraisers must be first appointed to appraise nothing or the blue sky before setting the machinery of the law in motion to adjudicate that goods are missing. Applying mathematical reasoning to such a naive syllogism, we might say that under those circumstances simple addition would give the result or answer the same as the minuend in the present case. Under their hypothetical case no subtraction would be necessary for there would be nothing to subtract. That line of argument not only presupposes a different accounting problem but overlooks the simple arithmetical rule that subtraction is the reverse of addition. Every case stands on its own statement of facts and such an odious analogy is fallacious and wrong both in principle and application. However, they cannot escape the mandate of the law that the goods found must be appraised in the manner provided by Congress, and that is our complaint.

V.

Wilful Contempt Of Law By An Inferior Judge Or Magistrate Is Greater Than the Contempt Of a Citizen That Fails To Obey the Court In the Exercise Of Its Irregularity.

Among the six (6) classifications of contempt William Blackstone at page 284, Book IV of his Commentaries lists as the first and primary of all contempts "Those committed by inferior judges and magistrates; by acting unjustly, oppressively or irregularly." A litigant in contempt as a rule cannot proceed with litigation. Query: Should an inferior court proceed with litigation based in whole or in an essential part upon a premise arrived at and based upon a procedure not recognized by the law?

It would seem from the reported cases that in the face of the positive mandate of Section 70-b of the Bankruptcy Act, few Bankruptcy Courts, if any, have before this occasion, ever failed to abide by it, or to treat that portion of the act as a nonessential. Quoting the language of District Judge Archbald, in the case of *In re Gordon Supply & Mfg. Company, 133 Fed. (Pa.) 798:*

> "The Bankruptcy Act provides that all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers, who shall be appointed by and report to the court. The manifest purpose of this is to secure for the benefit and *protection of all parties concerned* a designation and estimate of the property which passes into the hands of the trustee, and *for which in the first instance he is accountable.*" (Italics ours.)

If the Receiver and Trustee in Bankruptcy had failed or refused to account to the court for so large a quantity of the goods in his possession how could he, on his petition, compel the respondent to account for goods in his. For aught the court could well presume that the goods that were in the trustee's possession were the very goods he sought to compel the respondent to again produce. We cannot continue further in the realm of possibilities lest by our reasoning we should seem to accuse a trusted official of the court as the respondent is accused by a procedure unknown and forbidden by law. We are much in sympathy with those who honestly attempt to enforce the Bankruptcy Laws, and all laws, by legal means and orderly procedure.

VI.

Jurisdictional Facts.

Want of jurisdiction is a question that the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be considered on its merits. *Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543.* We have already shown that this case has no counterpart in point of fact or procedure, or the lack of it, and if the goods subtracted were ascertained by the court through a method contrary to law the remainder of the proceeding is illegal and void.

But we rather anticipate a query to the effect that the record shows that the Referee's order was reviewed by the District Judge who issued the commitment for contempt complained of here; and is not the District Court a court of general and unlimited jurisdiction in Bankruptcy matters and every presumption of his jurisdiction, not affirmatively denied on the record, to be

indulged in by this court? That question was answered in the negative by Chief Justice Marshall in the case of *Ex parte Buford, 3 Cranch, 449, 453, 2 L. Ed. 495;* in the following language:

> "He observed that the Circuit Court did not reverse nor annul the original proceeding by the magistrates. It only diminished the sum in which bail should be required, and limited the duration to one year. It passed no new judgment but merely remanded the prisoner; it heard no evidence; it was not a proceeding *de novo;* it gave no judgment; it convicted the prisoner of no offense. He is, therefore, still detained under the authority of the warrant of the justices; and if that is defective, there is no just cause of detainer. But if the remanding by the circuit is to be considered as a new commitment, it is still a commitment upon the old ground; and if that was illegal, the order of the circuit court has not cured its illegality."

Perhaps the writer should refrain from the unpleasant duty of explaining the reasons why the purported appraisal was not only unauthorized by law and voided all proceedings based upon it including the private sale without notice as provided by Section 58 of the Bankruptcy Act. Those transactions, seemingly form a part of the scheme of things, purposely or inadvertently, whereby the respondent, Dasher, is made to atone. In fairness to counsel and to this court we state that our legal position in that regard coincides with every essential statement of fact found in the two reported cases of *In re Frazin & Oppenheim, 181 Fed. 309;* and *In re Lake Champlain Pulp & Paper Company, 20 Fed. (2nd) 425.* We regret to mention that such transactions can happen and the innocent be compelled to suffer for the guilty. Our purpose is to defend not to accuse.

VII.

Conclusion.

It is evading the question involved herein to assert that the jurisdiction of the Referee does not depend upon the correctness of his order. For in fact it is an order and not a final decree or judgment from which a general appeal will lie. Jurisdictional facts are those which condition the power of the courts to decide some of the issues in the case.

In addition to the many citations and examples of jurisdictional facts stated by this court in *Noble v. Union River Logging R. Company, supra,* we liken the absence of the appraisal before the turn-over order in the instant case to a final decree upon a creditor's bill before an action at law has been reduced to judgment; or the examination by a judgment creditor of a judgment debtor under the prevailing state statutory proceeding after judgment, before execution by the Sheriff is returned *nulla bona.* Without such prerequisite acts the proceeding is a nullity.

In closing it is stated without fear of contradiction that upon presenting the petition to be purged of contempt attached to the petition herein, the District Judge announced *ore tenus* that he was satisfied with Mr. Dasher's account of the specifically described goods referred to in the turn-over order and, using his own language, "If that was all of the order I would not keep him in jail a minute." If that part of the order should be urged as an excuse to deny this petition for habeas corpus and certiorari, it is enough to say that Mr. Dasher fully accounted for each and every item described. If the court did not accept his sworn statement he is still

deprived of his liberty unlawfully from the time the court refused to allow him to call witnesses to prove his newly arisen inability since the turn-over order to deliver them in compliance with the commitment. *Oriel v. Russel, 278 U. S. 358, 73 L. Ed. 419, 424.*

The office of Referee is only inaccurately called a court. It is the most limited in its jurisdiction of any other tribunal in the Federal Judicial System. Its jurisdiction over a subject matter and to enter a turn-over can be attacked for the lack of a jurisdictional fact such as an appraisal of the goods before declaring a shortage. There is nothing in *Oriel v. Russel, supra,* to the contrary.

This petition for a habeas corpus and certiorari should in favor of liberty be granted, especially since the petitioner sets up in his petition both to this court and the District Court that he relied upon the integrity of the Referee's court to such an extent that he did not suspect the nature of the purported appraisal as being other than an official appraisal in accordance with the provisions of the Bankruptcy Laws until and after he had been committed to jail on a turn-over order based upon a clandestine appraisal. The credulity and faith of the weak and the ignorant in our courts will be raised to a premium by the issuance of a writ of habeas corpus and certiorari in the instant case. There is no other form or means of appeal and the records of the Referee's court will disclose the truth or untruth of the petition filed herein on the return of the Writ of Certiorari.

The liberty of the respondent prisoner should be restored and the violence under the guise of legal form should not be condoned.

Respectfully submitted,

BURTON G. HENSON,
Solicitor for R. F. Dasher,
Respondent in Contempt.

SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1933.

Frank E. Cooper, as Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt, Petitioner,
vs.
R. F. Dasher, Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

[November 6, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

During the night immediately following the filing of a bankruptcy petition the president of a bankrupt corporation withdrew the bulk of the merchandise by stealth and lodged it in hiding places known only to himself. Part has been retrieved; part is still concealed. The District Court, confirming the report of a referee, made a turnover order for the return by the respondent of the property withheld. On the ground that the order was void for indefiniteness the Court of Appeals for the Fifth Circuit reversed it, except as to a few items no longer contested. 63 F. (2d) 749. A writ of certiorari, sued out by the trustee in bankruptcy, brings the case here.

The bankrupt corporation began the business of the sale of drugs on May 26, 1930, and was thrown into bankruptcy the following February. The respondent, Dasher, was its president, and he, his wife and his infant son were the holders of the shares. The cost of all the merchandise owned by the bankrupt during the life of the business was $72,551.82; the sales, less the gross profits, were $23,056.01. There should have been on hand at the bankruptcy merchandise of the value at cost of $49,495.81. Only $29,754.16 in value has come into the possession of the trustee or the receiver. Much of this would have been lost to the creditors if it had not been unearthed from the hiding-places where it had been concealed by the respondent. The value at cost of the undelivered residue is nearly $20,000. Of this residue a few items ($583.69) have identifying marks or labels. The propriety of a turnover

order as to these is no longer disputed. There is left an ultimate residue ($19,157.66 in value) secreted by the respondent and still withheld from the estate.

The referee, after giving the respondent an opportunity to account for the disposition of the assets, has ordered the return of this undelivered residue. The findings describe it as the "balance of merchandise in the hands of the said R. F. Dasher at the time of bankruptcy at a cost price value of $19,157.66, of a class of merchandise shown by the proofs of claim to have been purchased on the credit of the bankrupt corporation and delivered to it, and of such a class of merchandise as is usually carried and sold in a retail drug store, but which is not capable of a more specific description, such more specific description being known only to the respondent in this cause." The description in the findings is repeated in the order with unimportant verbal changes.

The respondent has made away with goods belonging to the estate and defiantly withholds them. So the referee has found upon evidence not in the return and hence presumably sufficient. The process of computation and inference outlined in his report and leading up to his conclusion has support in many cases. See, e. g., *In re H. Magen Co.*, 10 F. (2d) 91, 93, 94; *In re Chavkin*, 249 Fed. 342; *In re Stavrahn*, 174 Fed. 330; *In re Levy*, 142 Fed. 442; *Sheinman* v. *Chalmers*, 33 F. (2d) 902; *In re Cohan*, 41 F. (2d) 632. The abstraction of the merchandise being evidenced by clear and convincing proof, there is no doubt about the jurisdic- of the court to direct a summary return. *Oriell* v. *Russell*, 278 U. S. 358. The respondent seeks to thwart the exercise of this conceded jurisdiction by the objection that the merchandise is not sufficiently described. He says that instead of the general description in the findings and the order there should be an inventory of items. The drugs, the perfumery, the surgical appliances and the many miscellaneous articles that make up the stock in trade of a modern drug store should be set forth, he insists, in particular schedules. Only thus, we are told, will the respondent be in a position to understand the mandate to which obedience is due.

Misunderstanding of the mandate is upon the facts in this record an illusory peril. The order gives the only description that the nature of the case allows. The respondent, and no one else, is in a position to supply a better one. The mandate is addressed to him, and to him its meaning is definite, however indefinite to others.

If it is clear enough to be understood, it is clear enough to be obeyed. "All evidence," said Lord Mansfield in *Blatch* v. *Archer*, Cowper, 63, 65, "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." *Kirby* v. *Tallmadge*, 160 U. S. 379, 383. The validity of this order is to be subjected to a kindred test. Words after all are symbols, and the significance of the symbols varies with the knowledge and experience of the mind receiving them. The certainty of a description is always a matter of degree. *Doherty* v. *Hill*, 144 Mass. 465; *Marks* v. *Cowdin*, 226 N. Y. 138, 143. "In every case the words must be translated into things and facts by parol evidence." Holmes, J. in *Doherty* v. *Hill, supra*, p. 468. How many identifying tokens we are to exact the reason and common sense of the situation must tell us. There are times when a restraining order enjoins the commission of acts that are not within the peculiar knowledge of the one to be enjoined. *In re Huntley*, 85 Fed. 889, 893; cf. *Ketchum* v. *Edwards*, 153 N. Y. 534, 539. In that event the requirement of definiteness assumes a new importance, and failure to give heed to it may even make the order void. No doubt it is wise, irrespective of the knowledge of the parties, to make the terms of the order as definite as possible. The findings of the referee show that this is what was done. To insist upon more would be to sacrifice the substance of the right to the magic of a formula. In the ensuing war of words the wrongdoer would be enabled to slip away from his pursuers and take advantage of his wrong.

An argument is based upon embarrassments that may clog the enforcement of other remedies hereafter. The respondent, it is said, may refuse to comply with the order and may be sent to jail till he obeys. If later he repents and tenders a stock of goods to the trustee, the marshal will not know whether the tender is complete and will be unable to determine whether to hold him or to let him go. See *In re Miller & Harbaugh*, 54 F. (2d) 612, 616. Embarrassments such as these, contingent and imaginary, will be resolved when they develop. The description of the merchandise might be much more definite than it is without enabling a marshal to identify a stock in trade, unaided by the advice of those acquainted with the business. Besides, the court is always in reserve, with capacity to act when the dispute becomes acute. If

the respondent makes a genuine effort to restore the secreted goods, there will probably be little difficulty in determining whether the tender is sufficient. At present, the marshal is not before us praying for instructions, nor is the respondent yet in jail. We are not to presume that the order will be flouted. Let the respondent yield obedience to a mandate intelligible to him, and his liberty is then assured. The law will not be overpatient with his protest that if he persists in his defiance, he may be caught in his own snares.

The form of turnover orders in bankruptcy proceedings has been much considered in the federal courts. It has provoked a difference of opinion. In accord with the decision of the court below are decisions of the Court of Appeals for the ninth circuit and the first. *In re Miller & Harbaugh*, 54 F. (2d) 612; *In re Goldman*, 62 F. (2d) 421, one judge dissenting. The contrary view has been taken in the fourth circuit and the second. *Kirsner* v. *Taliaferro*, 202 Fed. 51; *In re H. Magen Co.*, 10 F. (2d) 91. Many orders not unlike the one in question have been upheld *sub silentio* in the absence of objection. *Prela* v. *Hubshman*, 278 U. S. 358; *Epstein* v. *Steinfeld*, 210 Fed. 236; *Sheinman* v. *Chalmers*, 33 F. (2d) 902; *In re Cohan*, 41 F. (2d) 632.

The order should be reversed and the cause remanded to the District Court with instructions to proceed in accordance with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.